Supreme Court of the United States.

In Re ALEXANDER McKENZIE, PETITIONER.

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

Now come Jeremiah M. Wilson, Thomas J. Geary, C. A. Severance, and F. B. Kellogg, of counsel for Alexander McKenzie, the petitioner, and move this honorable court for leave to file the petition herewith exhibited of the said Alexander McKenzie for a writ of *habeas corpus* and a writ of certiorari.

JEREMIAH M. WILSON,
THOS. J. GEARY,
C. A. SEVERANCE,
F. B. KELLOGG,
Of Counsel for Petitioner.

[Endorsed:] In the Supreme Court of the United States. *In re* Alexander McKenzie, petitioner.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No......

IN RE ALEXANDER MCKENZIE, PETITIONER.

BRIEF ON PETITION FOR HABEAS CORPUS.

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Supreme Court of the United States

OCTOBER TERM, 1900.

No. .....

IN RE ALEXANDER McKENZIE, PETITIONER.

BRIEF ON PETITION FOR HABEAS CORPUS.

This is an application for a writ of *habeas corpus*, together with a writ of certiorari and such other remedy as to the court may seem proper, based upon the following facts set forth in the petition:

The petitioner, McKenzie, was, on July 23, 1900, appointed as receiver of certain mines and mining property near Nome, Alaska, in two certain causes then pending in the district court for the district of Alaska, one of said causes, as set forth in the petition, being entitled Melsing *vs.* Tornanses *et al.*, and the other being entitled Rogers *vs.* Kjellman *et al.*

The order appointing said McKenzie as receiver in the case of Melsing *vs.* Tornanses *et al.* is to be found in Exhibit B, page 22, attached to the petition. This order of appoint-

ment was made on July 23, 1900, and on the following day the defendants appeared and moved to set aside the order, which motion was denied; and thereafter, on the 29th day of August, 1900, a petition for an appeal from said order so appointing said McKenzie as receiver, as aforesaid, in each of said two cases was presented to the Hon. W. W. Morrow, circuit court judge, at chambers, in the city of San Francisco. Said judge thereupon made an order allowing said appeal, and he approved a supersedeas bond then presented to him, and signed a citation to the plaintiff, which said papers will be found on pages 23 to 33 of Exhibit C.

The petition and order, together with the bond and its approval, were thereupon filed in the office of the clerk of the United States circuit court of appeals, at San Francisco, and have since remained on file in said court.

On the same day that said appeals were allowed the said judge, Hon. W. W. Morrow, made an order in each of said two cases directing the clerk of the circuit court of appeals to issue a writ of supersedeas in the form presented to said judge by the counsel for said appellant (Exhibit "A," p. 16). This order was likewise filed in the office of the clerk of the circuit court of appeals, and neither said order nor any copy thereof was ever filed in the office of the clerk of the district court for the district of Alaska, or called to the attention of the petitioner herein, until after his arrest. The clerk of the circuit court of appeals thereupon assumed to issue, and did sign and seal, papers purporting to be writs of supersedeas, dated on said August 29 (Exhibit "A," pp. 16 and 17); which writs, among other things, commanded said receiver to deliver to the defendants in said two causes all the property that had come into his hands by virtue of his said office.

These writs were sent to Alaska for service, and were served upon the petitioner on the 14th day of September, 1900, and on the same day the citations above referred to were served upon counsel for the appellees, and on said day, and after demand had been made upon petitioner for the surrender of said property to the defendants, were filed in the office of the clerk of said district court. No other original papers upon said appeal were at any time filed with the clerk of the district court for Alaska, but copies of the petition and order allowing the appeal and of the bond and its approval, certified by the clerk of the United States circuit court of appeals for the ninth circuit, were filed in the office of the clerk of the district court.

Upon the demand being so made upon him, the petitioner requested permission to advise with his counsel as to his duty in the premises, and upon the following day, to wit, September 15, and before his counsel had completed his investigation of the matter, the judge of the district court for Alaska made an order requiring the United States marshal for said district to take into his possession and hold, subject to the further order of the court, all the gold that had theretofore been extracted from said mines, and which had, pursuant to orders previously made, been deposited in safe-deposit vaults at Nome. The petitioner, on the 14th of September, shortly after being served with said papers purporting to be writs of supersedeas, stopped all operations at said mines and discharged the laborers employed in mining therein, and the appellants entered into possession of the mines and have since remained in possession, undisturbed by petitioner. On the 17th of September affidavits were made charging the petitioner with disobedience to said writs. The same were sent

to San Francisco and presented to the United States circuit court of appeals on the 2d day of October, and thereupon said court made identical orders in said two causes, among other things requiring said petitioner to show cause on November 5, at San Francisco, why he should not be punished for contempt of court in failing to obey the injunctions contained in said writs of supersedeas (Exhibit "A," pp. 7 to 20). The petitioner was thereupon arrested brought to the city of San Francisco by a marshal who was sent out to Alaska by the court of appeals, and upon being brought into court, after certain continuances, on January 14, 1901, a plea to the jurisdiction was filed by petitioner in each of said two causes, which said pleas were overruled. A copy of said plea will be found on pp. 35 to 37, Exhibit D, attached to the petition herein.

The petitioner thereupon filed answers in said causes which were substantially identical. A copy of the answer in said case of Melsing *vs.* Tornanses appears on pages 38 to 41, Exhibit D, attached to the petition. Evidence by way of affidavits and parol testimony was introduced, all of which is set forth in Exhibit D, attached to said petition. Thereupon, after considering said matter, said court of appeals, on the 11th day of February, 1901, adjudged the petitioner guilty of contempt in each of said causes in failing to obey the said writs of supersedeas issued by the clerk of the court of appeals on the 29th day of August, 1900, and sentenced him to imprisonment in the county jail for the county of Alameda, California, for the period of six months in each case, the term of imprisonment in said case of Melsing *vs.* Tornanses to commence at

once, and in said other cause immediately upon the expiration of the said period of six months. Petitioner was at once taken into custody and is now confined in said jail in the custody of Oscar L. Rogers, sheriff of said Alameda county, under the aforesaid judgment in the case of Melsing *vs.* Tornanses, a copy of which judgment is attached to the petition herein (Exhibit D, pp. 105 to 122).

Petitioner claims that he is illegally restrained of his liberty, for the reason that the said writs of supersedeas are void, and that the court of appeals neither at the time the said writs were issued, nor at any other time, had jurisdiction of the said appeals so attempted to be taken, and that there was no legal authority for the issuance of said writs of supersedeas, and the petitioner makes the following suggestions on that behalf:

I.

The writ of supersedeas, for the violation of which petitioner is imprisoned, was and is absolutely void, for the following reasons:

(*a.*) At the time the same was issued, to wit, on the 29th day of August, 1900, the circuit court of appeals was absolutely without jurisdiction of the cause in which said writ was issued, for at that time no appeal had been taken in said cause to the said circuit court of appeals.

(*b.*) That the clerk of said court was without authority to issue and seal said writ of supersedeas except when so ordered by said court of appeals, acting as a court. The writ in this case was issued solely by direction of the Hon. W. W. Morrow, circuit judge, and was never directed to be issued by the circuit court of appeals for the ninth circuit.

II.

(*a.*) Because there is no provision of law authorizing an appeal from an interlocutory order, made by the district court of Alaska, appointing a receiver, or from an order refusing to discharge a receiver, and the order from which Judge Morrow allowed an appeal was an interlocutory order appointing a receiver, and not an interlocutory order granting an injunction or refusing to dissolve an injunction, and in an injunction case the bond must be approved by the lower court. (See Rule 13, sub 2, Rules Circuit Court of Appeals.)

(*b.*) The powers of the circuit court of appeals for the ninth circuit in allowing appeals from interlocutory orders made by the district court of Alaska are defined specifically by the Alaskan Code, so called, but even conceding the court of appeals act (as amended June 5, 1900) to be applicable to appeals from the district court of Alaska, then the appeal nevertheless, must fail for the reason that the same was not taken in the time allowed by law. The order in question having been made on July 23 and the citation signed by Judge Morrow (which was the only original paper ever filed in the district court of Alaska) not having been filed in said court until September 14, 1900, more than thirty days after the order complained of had been made, the appeal was taken too late.

III.

Neither the judge of the circuit court of appeals for the ninth circuit nor the court itself had any power to order or allow said writ of supersedeas, for the reason that, conceding for

the purpose of the argument only that the order in question is an injunctional order, as claimed, the power to allow supersedeas in such cases is, by law, vested exclusively in the district court of Alaska.

IV.

No appeal was ever taken in these causes for the reason that neither the petition for an appeal nor the order allowing the same nor the bond upon appeal nor the approval thereof was at any time deposited or filed with the clerk of the district court for the district of Alaska.

V.

The records in the causes in which such appeals were allowed were not lodged in the said circuit court of appeals or docketed in said court within the time allowed by Rule 16 of the circuit court of appeals, nor was the time to docket the same extended during said period.

VI.

Even conceding that Judge Morrow had the right to allow an appeal from the order appointing a receiver, made by the district court of Alaska, to approve a bond, and direct that said order should be superseded, still the writ issued by the clerk under his authority, in so far as it directed return of the proceeds of the property, was in excess of his authority, as he could only direct a stay of proceedings under the order appointing a receiver, and not the return of the property, which, in effect, operated to reverse the order of the district court of Alaska.

VII.

It will undoubtedly be conceded that, if the writ of supersedeas was void for any of the reasons above stated, petitioner could not be punished for its violation.

We will take up these propositions in their order:

I.

(*a.*) At the time the writ of supersedeas was issued, to wit, on the 29th day of August, 1900, the circuit court of appeals was absolutely without jurisdiction of the cause in which said writ was issued, for at that time no appeal had been taken in said case to the said circuit court of appeals.

The authorities are uniform that an appeal is not "taken" simply on an allowance of the same by a judge, or by the taking and approving of security and the signing of a citation. It is only "taken" when the allowance is filed in the office of the clerk of the court in which the judgment or order complained of was made—that is, in this case, in the office of the clerk of the district court for the district of Alaska.

The circuit judge in allowing an appeal from the district court of Alaska does not act as a member of the court of appeals, but only as an officer authorized by law to allow such appeal. He has no other or greater functions than the district judge for the district of Alaska, who may likewise allow an appeal. The petition and order allowing the appeal and the appeal bond, with its approval, were on the 29th of August lodged in the office of the clerk of the court

of appeals. This was clearly ineffectual and not justified under the statute or decisions.

Credit Company *vs.* Arkansas Central R'y Co., 128 U. S., 258.
Mussina *vs.* Cavazos, 6 Wall., 355.
Scarborough *vs.* Pargoud, 108 U. S., 567.
Polleys *vs.* Black River Co., 113 U. S., 81.
Brandies *vs.* Cochrane, 105 U. S., 262.
Farrar *vs.* Churchill, 135 U. S., 612.
Foster *vs.* Kansas, 112 U. S., 201.
Fowler *vs.* Hamill, 139 U. S., 550.
Cincinnati Safe & Lock Co. *vs.* Grand Rapids Safety Deposit Co., 146 U. S., 54.
Aspen Company *vs.* Billings, 150 U. S., 31.
Harkrader *vs.* Wadley, 172 U. S., 163.
United States *vs.* Baxter, 51 F. R., 624.
City of Waxahachie *vs.* Coler, 92 F. R., 284.
Threadgill *vs.* Platt, 71 F. R., 1.
Stevens *vs.* Clark, 62 F. R., 324.
In re Goodman, 101 F. R., 920.

In Credit Co. *vs.* Arkansas Central R'y Co. (*supra*) the court had under consideration an appeal. On the 22d of January, 1883, a final decree was entered dismissing the bill for want of equity. On the 22d of January, 1885, exactly two years after the entry of the decree, a petition for an appeal was presented by the solicitor for the complainant to Mr. Justice Miller, and allowed. At the same time Justice Miller signed the citation and approved the bond. These papers were filed with the clerk of the circuit

court on the 27th day of January, 1885, being five days after the two years from the date of the final decree. After quoting the language of Chief Justice Taney in Brooks *vs.* Norris (11 Howard, 203), where he said:

"It is the filing of the writ that removes the record from the inferior to the appellate court, and the period of limitation prescribed by the act of Congress must be calculated accordingly"—

The court proceeds as follows:

"The same rule is applicable to appeals as to writs of error. Section 1012 of the Revised Statutes declares that appeals from the circuit courts and district courts acting as a circuit court and from district courts in prize cases shall be subject to the same rules, regulations, and restrictions as are or may be prescribed in law in cases of error.. * * * An appeal cannot be said to be 'taken' any more than a writ of error can be said to be 'brought' until it is in some way presented to the court which made the decree appealed from, thereby putting an end to its jurisdiction over the cause and making it its duty to send it to the appellate court. This is done by filing the papers, viz., the petition and allowance of appeal (where there is such petition and allowance), the appeal bond and the citation."

In Brandies *vs.* Cochrane (*supra*) it was held that, in the absence of a petition for an appeal and allowance, the filing of the appeal bond, duly approved by a justice of this court, was sufficient evidence of allowance of an appeal, and established compliance with the law requiring the appeal to be filed in the clerk's office.

In Farrar *vs.* Churchill (*supra*) this court had under consideration a cross-appeal, and said:

"And so, when a cross-appeal is allowed by a justice of this court the petition and order of allowance must be filed in the court below, in order to the due taking of the cross-appeal under the statute."

The rule in Credit Co. *vs.* Arkansas Central R'y Co. (*supra*) has been approved and applied by this court in the cases of Fowler *vs.* Hamill (*supra*), Cincinnati Safe and Lock Co. *vs.* Grand Rapids Safety Deposit Co. (*supra*), and in the very late case of Harkrader *vs.* Wadley, 172 U. S., 163, and has been repeatedly followed by the various courts of appeals of the country in the cases we have cited, the last one being in the case of *In re* Goodman, 101 F. R., 920, decided by the circuit court of appeals for the seventh circuit in May, 1900, where an appeal was dismissed by reason of the fact that the petition and order allowing the appeal were not filed in the office of the clerk in the court below until the day after the time for appeal had expired.

In Farmers' Loan & Trust Co. *vs.* Chicago & N. P. R. R. Co., 73 F. R., 316, the circuit court of appeals of the seventh circuit says:

"The citation is intended only for the purpose of notice, and is not jurisdictional, and may be waived or substituted by proof of other equivalent notice," citing several decisions from this court.

The circuit court of appeals for the ninth circuit takes the position that this appeal was "taken" within the meaning of the statute by reason of the filing of the citation in the office of the clerk of the district court for Alaska on the 14th day of September, relying upon the decision of this court in Brown *vs.* McConnell, 124 U. S., 489.

With reference to that case, it is sufficient to say, first, that it has never been referred to as an authority in any subsequent decision of this court except in the case in the same volume immediately following it, and, second, it was decided upon the particular facts of the case, which were that there was in fact no petition and order of allowance of the appeal, and the court, for that reason, said that the citation was intended to take the place of such order of allowance and would be construed to be the allowance of the appeal.

In the Credit Company case, however, in 128 U. S. (*supra*), the court expressly holds that, where there is a petition and allowance, it must be filed with the clerk of the court below.

In this case there was a petition presented to Judge Morrow, and upon that petition he made an order allowing the appeal; he also took the security and approved it, and the citation itself refers to the petition and order allowing an appeal showing that the citation was not intended to take their place. Therefore the case is not within the exception noted in the case of Brown *vs.* McConnell, which, as we have said, has never been mentioned as an authority by this court since it was decided. Therefore the circuit court of appeals never acquired jurisdiction of the case, and hence the writ of supersedeas is clearly void.

(*b.*) That the clerk of said court was without authority to issue and seal said writ of supersedeas except when so ordered by said court of appeals, acting as a court. The writ in this case was issued solely by direction of the Honorable W. W. Morrow, circuit judge, and was never directed to be issued by the circuit court of appeals for the ninth circuit.

On the 29th of August and until the 14th of September, 1900, no paper whatever relating to an appeal had been filed in the office of the clerk of the district court for the district of Alaska. Therefore, even conceding that the filing of citation would give the court of appeals jurisdiction, that jurisdiction did not attach until September 14. The court of appeals was not in session on the 29th of August. The writ of supersedeas was issued only upon the order of a single circuit judge, in vacation, and said judge had no authority to direct the issuance of such writ. The court below, in its decision, claims that a single judge has such authority, basing its decision upon the case of *In re* Claasen, 140 U. S., 200, and rule 36 of this court, which provides that at the time of allowance of a writ of error a justice of the court may allow a supersedeas. The difficulty with the position of the court below is that it fails to recognize the distinction between an order of a single judge who allows an appeal that the writ of error or the allowance of an appeal may operate as a supersedeas and the right of such single judge to cause to be issued a writ of supersedeas out of and under the seal of the court.

In the case of *In re* Claasen this court used the following language:

"That this court as a court has power to issue a writ of supersedeas under section 716 of the Revised Statutes is quite clear, for that section gives it power to issue all writs not specifically provided for by statute which may be necessary for the exercise of its jurisdiction and agreeable to the usages and principles of law."

In Hudson *vs.* Parker, 156 U. S., 277, the court again says that the court as a court has authority to grant a supersedeas

under section 716, and a single judge has authority to grant supersedeas under section 1000. Section 716 refers specifically to writs; section 1000 does not in any way refer to writs. In the Claasen case and in Hudson *vs.* Parker the justice who allowed the writs of error made an endorsement that such writs of error should operate as supersedeas. That was proper under rule 36 and under the statute, but it falls far short of holding that a single judge out of term can order the clerk of the appellate court to issue a writ of that court which can only be issued by the court as a court. Section 716 provides only for the issuance of writs by the court; section 717, immediately following it, provides that writs of *ne exeat* may be granted by any justice of the Supreme Court in cases where they might be granted by the Supreme Court, and by any circuit justice or circuit judge in cases where they might be granted by the circuit court of which he is a judge. Section 718 provides that whenever notice is given of a motion for injunction out of a circuit court or district court the court or judge thereof may, if there appears to be danger of irreparable injury from delay, grant an order restraining the acts sought to be enjoined until decision upon the motion. Section 719 provides that writs of injunction may be granted by any justice of the Supreme Court in cases where they might be granted by the Supreme Court, and by any judge of a circuit court in cases where they might be granted by such court.

It is entirely clear that where power is given to the court as a court, as in section 716, it was not the intention of Congress to vest the power of the court in a single judge or justice of that court. If it had been so intended there would have been no necessity of the express provisions in the three

sections following section 716, granting such powers to the justices of the Supreme Court and the circuit court judges in those specific cases.

If Judge Morrow, as a single judge, who may or may not be acting as a judge of the court of appeals, can set in motion the machinery of the court of appeals, and direct its clerk to issue a writ which the statute says can be directed only by the court, as a court, then any other judge authorized to allow an appeal from the district court of Alaska can make the same direction to the clerk of the court of appeals. Judge Morrow's powers are no greater than are the powers of a district judge of the district court of Alaska in allowing appeals out of term. If Judge Morrow can direct the clerk of the court of appeals to issue a writ of that court in a cause of which it has not acquired jurisdiction, a judge of the district court of Alaska could likewise do the same thing, although he could, under no circumstances, be or become a member of such court of appeals.

This court being governed by the same rules of practice as the circuit court of appeals for the ninth circuit, the judge of the district court of Alaska, from whose court appeals in certain causes lie direct to this court, might make an order at the time he allowed an appeal and send it to the clerk of this court, at Washington, directing the clerk to issue writs of supersedeas, which writs might command the doing of acts most objectionable to this court. If the authority and jurisdiction be conceded, then writs of the Supreme Court of the United States may be directed by the judges of any inferior courts, from whose courts appeals lie to the Supreme Court.

It will be observed that, under sections 717 and 718 and

719, where power is expressly given to the various judges to cause writs to be issued from their courts, that authority is only given to justices of the Supreme Court as to writs issuing out of the Supreme Court and as to the circuit court justices or circuit judge as to writs issuing out of the circuit court.

The order that Judge Morrow was authorized to make in this case, allowing an appeal or granting a supersedeas, was an order in the lower court. The statute permits that order to be made by any one of the various judges of the lower or appellate court for convenience of parties, where, for any reason, it was not convenient or possible to pray an appeal in open court in the court below.

In Hudson *v.* Parker (*supra*) it is clearly laid down that the power of a judge to grant supersedeas is given by section 1000, and not by section 716; and this court has always held that its power to issue writs in aid of its jurisdiction, and for the protection of its jurisdiction, was conferred by section 716.

If Judge Morrow, in allowing an appeal, had simply approved the security that had been filed in the court below, it would have operated as a supersedeas and stayed all proceedings. After this appeal was thus taken (in the language of the decisions) and the case was transferred to the appellate court, then that court had authority, for the protection of its jurisdiction, to issue all proper writs; but the writ in question was absolutely void when issued, and no subsequent action could make it valid, as at that time no appeal had been taken.

II.

(*a.*) Because there is no provision of law authorizing an appeal from an interlocutory order made by the district court of Alaska appointing a receiver, or from an order refusing to discharge a receiver, and the order from which Judge Morrow allowed an appeal was an interlocutory order appointing a receiver and not an interlocutory order granting an injunction or refusing to dissolve an injunction; and in an injunction case the bond must be approved by the lower court. (See Rule 13, sub. 2, Rules Circuit Court of Appeals.)

The jurisdiction of the court of appeals of the ninth circuit to entertain appeals from and review orders, judgments, and decrees in causes commenced in the district court of Alaska is defined and limited, and solely dependent upon the provisions of chapter 51, part 4, of Carter's Annotated Alaska Code, p. 252. Section 507 of said Code is as follows:

"An appeal may be taken to the circuit court of appeals from any interlocutory order (granting or dissolving an injunction), refusing to grant or dissolve an injunction made or rendered in any cause pending before the district court, within sixty days after the entry of such interlocutory order. The proceedings in other respects in the district courts in the cause in which such interlocutory order was made shall not be stayed during the pendency of such appeal unless otherwise ordered by the district court."

On the same day that the Alaska Code was approved, to wit, June 6, 1900, an act amending section 7 of the court of appeals act was approved, which allowed an appeal from

an interlocutory order made by a circuit court appointing a receiver.

In the case of The Steamer *Coquitlam vs.* United States, 163 U. S., 346, the court held that the circuit court of appeals could not review the final judgments or decrees of the Alaska court by virtue of its appellate jurisdiction over the district courts mentioned in the act of March 3, 1891, and the appellate jurisdiction exercised by the court of appeals of the ninth circuit over judgments and decrees of the Alaska court was only exercised by virtue of the general authority conferred by the fifteenth section of the act of 1891 to review the judgments of the supreme court of any territory assigned to such circuit.

Congress could not have intended the amendment to the court of appeals act of June 6, 1900, to apply to Alaska, because it on the same day passed an act making a code for Alaska, excluding the right of appeal from orders appointing receivers. It is a familiar rule of law that a statute relating to a special subject will prevail over a general statute. The amendment to the court of appeals act, allowing such appeal from an order appointing a receiver, was regarded as necessary by reason of the decision of this court in the case of Highland Avenue & Belt Railway *vs.* Columbia Equipment Co., 168 U. S., 627. (See also Florida Construction Co. *vs.* Young, 59 F. R., 721, and Jack *vs.* Cunningham, 102 F. R., 210.)

Without quoting at length from the decisions, it is sufficient to say that, in the Highland Avenue case, this court held that, although an order appointing a receiver contained an injunctional order, as in the case at bar, requiring the defendant to turn over to the receiver the property for which

he was appointed receiver, that that was only incidental and ancillary to the receivership, and that no appeal would lie from that order. That case seems conclusive upon the question that, under the terms of the Alaska Code, no such appeal is permitted.

(*b.*) The powers of the circuit court of appeals for the ninth circuit, in allowing appeals from interlocutory orders made by the district court for the district of Alaska, are defined specifically by the Alaska Code, so called; but, even conceding the court of appeals act (as amended June 6, 1900) to be applicable to appeals from the district court of Alaska, then the appeal nevertheless must fall for the reason that the same was not taken in the time allowed by law. The order in question having been made on July 23, and the citation signed by Judge Morrow (which was the only original paper ever filed in the district court of Alaska) not having been filed in said court until September 14, 1900, more than thirty days after the order complained of had been made, the appeal was taken too late.

If it be contended that the court of appeals act, as amended, is in *pari materia* with the Alaska Code, and that the power to allow appeals from the district court of Alaska exists also by virtue of the court of appeals act, then this appeal must fall for the reason that the order appealed from was made on the 23d day of July, and no paper relating to the appeal was filed in the office of the clerk of the district court for Alaska until September 14, 1900, much more than thirty days after the date of the order. It will be remembered that the Alaska Code gives sixty days in which to take an appeal from such interlocutory orders as are ap-

pealable under that code, but, if the court of appeals act is the foundation of the jurisdiction of the court of appeals, then its limitation must go with it, and the appeal will fail.

It is clear that this order is not a final order in any sense, although that is suggested by the court of appeals in its decision for the first time. That court had evidently come to the conclusion that it could not sustain its jurisdiction upon the ground originally asserted, to wit, that the order was an injunctional order, and therefore changes its base in its decision upon the contempt matter, and endeavors to justify its action upon the ground that the order is a final order.

An order appointing a receiver is certainly not a final order; it affects no man's property; it merely puts an impartial person in possession of the property, to hold it for the court until the true owner shall be determined by the judgment. The Alaska Code expressly authorizes the appointment of a receiver in an action of this character. See section —.

The Alaska Code also particularly defines a judgment. Section 234, chapter 24, part 4, of the code is as follows:

"A judgment is a final determination of the rights of the parties in the action."

III.

Neither the judge of the circuit court of appeals for the ninth circuit nor the court itself had any power to order or allow said writ of supersedeas, for the reason that, conceding, for the purpose of the argument only, that the order in question is an injunctional order, as claimed, the power to

allow supersedeas in such cases is, by law, vested exclusively in the district court of Alaska.

The latter part of section 507 of the Alaska Code, which section refers to appeals from interlocutory orders, provides:

"The proceedings in other respects in the district court in the cause in which such interlocutory order was made shall not be stayed during the pendency of such appeal, unless otherwise ordered by the district court."

That section was clearly intended to leave the matter of staying proceedings entirely in the hands of the court which made the injunctional order, and is in harmony with subdivision 2, rule 13, of the rules of the circuit court of appeals, which rules were made by this court for the government of the circuit court of appeals. It is provided by that rule that in cases of injunction a bond shall be approved by the court which granted the injunction. The reasons which actuated this court in making that rule are obvious. The necessity for restraining orders and injunctions is dependent upon local conditions, with which appellate courts, sitting thousands of miles from the place where such injunctions are granted, must necessarily be unfamiliar. Great hardships might arise if courts of appeals were permitted to suspend the operation of injunctional orders during the hearing. In the present case, for instance, the bill of complaint alleges that the defendants are exhausting the mines, taking the property out of the jurisdiction, and that they are insolvent and irresponsible. For the purpose of having that property in its control, so that the person eventually found entitled to it will have it preserved intact, the district court of Alaska appoints a receiver, which operates to prevent the looting of

the property by the defendants, who, the plaintiff says, have no right to the same. To permit a judge or a court unfamiliar with the situation to approve a bond in such cases was regarded as in violation of sound policy, and for that reason this court made the rule that it did for the government of the courts of appeals, and the Alaska Code contains the provision that it does for the same considerations appealed to Congress in passing that code.

Section 7 of the act of March 3, 1891, constituting United States circuit courts of appeals, contains the same provision with reference to staying proceedings as is contained in the Alaska Code. That section, after providing for appeals from interlocutory orders granting or denying an injunction, proceeds:

"Provided that the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court, and the proceedings in other respects in the court below shall not be stayed, unless otherwise ordered by that court during the pendency of such appeal."

It was held by this court, in the case of Haberman Mfg. Co., petitioner, 147 U. S., 525, that this provision left the matter of granting a stay pending an appeal in the discretion of the trial court. It was argued by counsel in that case that the expression that "the proceedings in other respects" should not be stayed had reference to other proceedings in the case outside of the injunctional order, and therefore the statute, by implication, meant that the proceedings on the injunctional order should be stayed. But this court overruled that contention.

See also Leonard *vs.* Ozark Land Company, 115 U. S., 465,

where it was decided that injunctions ordered upon final decree are not affected by an appeal, and that under equity rule 93 the judge in the court below is empowered to suspend or modify the injunction pending the appeal, and upon such terms as may be considered proper.

IV.

No appeal was ever taken in these causes for the reason that neither the petition for an appeal, nor the order allowing the same, nor the bond upon appeal, nor the approval thereof was at any time deposited or filed with the clerk of the district court for the district of Alaska.

We will not further discuss this matter, as it is embraced in the discussion of the first subdivision of our first proposition, except to add that the case of Foster *vs.* Kansas, 112 U. S., 201, which was likewise a contempt case, shows with what strictness the rule is applied, that, until the writ of error or the order allowing the appeal is lodged with the clerk of the court below, the jurisdiction of that court is unaffected, and the jurisdiction of the appellate court does not attach. There both parties in Kansas were advised by wire that a supersedeas had been allowed in Washington. The Kansas court, however, acted irrespective of this notice so conveyed, and this court held that such action was entirely lawful, and that until the cause was removed by lodging the papers in the lower court there was no inhibition upon that court preventing it from acting as though no appeal had been applied for. This court also adopted the rule we contend for in *Ex parte* Ralston, 119 U. S., 613, to which case we particularly call attention.

V.

The records in the causes in which such appeals were allowed were not lodged in the said circuit court of appeals or docketed in said court within the time allowed by Rule 16 of the circuit court of appeals, nor was the time to docket the same extended during said period.

The citation was returnable in thirty days from the 29th of August. The cause was not docketed within that time, and could not thereafter be docketed, unless the court of appeals, upon application properly made, within that period, extended the time. Therefore, when the affidavits were filed charging the petitioner with having violated the writ of supersedeas, the cause in which such writ purported to be issued was not pending in the circuit court of appeals; that court had no jurisdiction over the matter, and the attempt to vest jurisdiction in that court had lapsed by reason of the failure of counsel taking the appeal to perfect the same. In passing, it may be remarked that there was probably never a case in which all rules for taking and perfecting appeals were so entirely violated as in this case. The order allowing the appeal was entitled in the circuit court of appeals instead of the Alaska court. It was filed with the clerk of the court of appeals, who had no authority to receive the same. The petition was likewise so entitled and filed; the bond and its approval were also so entitled and filed in the court of appeals, and the order allowing the supersedeas, signed by Judge Morrow, was filed with the clerk of the court of appeals. This clerk had no authority to certify to them and make his certified copies of any value or effect

The certified copy to be used in lieu of the original must be certified by an officer, who is the lawful custodian of the original; That proposition is clearly elementary.

VI.

Even conceding that Judge Morrow had the right to allow an appeal from the order appointing a receiver, made by the district court of Alaska, to approve a bond, and direct that said order should be superseded, still the writ issued by the clerk, under his authority, in so far as it directed return of the proceeds of the property, was in excess of his authority, as he could only direct a stay of proceedings under the order appointing a receiver, and not the return of the property, which, in effect, operated to reverse the order of the district court of Alaska.

Goddard *vs.* Ordway, 94 U. S., 672.
Hovey *vs.* McDonald, 109 U. S., 150.
Slaughter-house Cases, 10 Wall., 273.
Staffords *vs.* King, 90 F. R., 136.
Schenck *vs.* Peay, 1 Dill., 267.
Beach on Receivers, sec. 235.
Knox *vs.* Harshman, 132 U. S., 16.
Hogan *vs.* Ross, 11 How., 294.
Kitchen *vs.* Randolph, 93 U. S., 86.
Sage *vs.* Central Railway Co., 93 U. S., 412.
Grant *vs.* Phœnix Mutual Life Insurance Co., 121 U. S., 118.
Boyle *vs.* Zacharie and Turner, 6 Pet., 648.

The Federal courts are ruled in such matters entirely by statute. Their sole authority to issue the writ of supersedeas must be traced to a general provision in the original judiciary act of 1789, which has been carried over into the Revised Statutes of 1878, as section 716. The provisions of this section were extended to the circuit court of appeals by section 12 of the act of March 3, 1891, which is as follows:

"That the circuit court of appeals shall have the powers specified in section 716 of the Revised Statutes of the United States."

Section 508 of the Alaska Code is as follows:

"All provisions of law now in force regulating the procedure and practice in cases brought by appeal or writ of error to the Supreme Court of the United States, or to the United States circuit court of appeals for the ninth circuit, except in so far as the same may be inconsistent with any provision of this act, shall regulate the procedure and practice in cases brought to the courts respectively from the district court for the district of Alaska."

From the acts above stated the circuit court of appeals must derive its jurisdiction, if any it has, to issue the writ involved in this case.

See authorities above cited; also—

Hardeman *vs.* Anderson, 4 How., 640.

Ex parte M. & N. R'y Co., pet., 5 Wall., 188.

This court has had occasion many times to call attention to the true course of procedure with reference to supersedeas. It has invariably acted upon the theory that this writ is not to be used as a weapon in the hand of a litigant, but is to be employed by the court only when necessary to

shield the jurisdiction which it has already assumed and acquired. This court has refused, after appeal has been taken, to interfere by supersedeas with the lower court, where there has been no intention to deny or attack its jurisdiction. Thus the lower court has been permitted to proceed and issue orders to its receiver looking to the preservation of the property in his hands, and this even where the proper steps to enable the writ of error to operate as a supersedeas had been taken.

Grant *vs.* Phœnix Mutual Ins. Co. (*supra*).

Goddard *vs.* Ordway (*supra*).

In the latter case the court said:

"A supersedeas upon the appeal of a suit in equity operates to stay the execution of the decree appealed from. * * * A supersedeas is not obtained by virtue of any process issued by this court, but it follows as a matter of law from a compliance by the appellant with the provisions of the act of Congress in that behalf. We are not required, therefore, to issue any writ to perfect the right of a party to that which the law has given him; but if the court below is proceeding, through mistake or otherwise, to execute its judgment or decree notwithstanding the supersedeas, we may, under sect. 716, Rev. Stat., issue an appropriate writ to restrain that action, for it would be 'a writ necessary for the exercise of our jurisdiction.'"

In Boyle *vs.* Zacharie and Turner (*supra*), the court said:

"But if the injunction could be admitted to operate as a supersedeas at law under any circumstances in the courts of the United States, there would yet remain a decisive objection against its application in the present case. Nothing is

better settled at the common law than the doctrine that a supersedeas in order to stay proceedings on an execution must come before there is a levy made under the execution, for if it comes afterwards the sheriff is at liberty to proceed upon a writ of *venditioni exponas* to sell the goods. * * * In the present case the levy upon the *fieri facias* was made more than a week before the injunction was granted, so that, according to the course of the common law, it ought not to operate as a supersedeas to a *venditioni exponas*."

The position of the sheriff in that case would seem to be strongly analogous to that of the receiver in the case at bar, and it will be noticed that the decision in this case not only permitted the sheriff to remain in possession, but authorized him to proceed to sell the goods. In the case at bar, the writ of supersedeas not only took the property in controversy from the possession of the receiver, but turned it back to the defendants, but it made no provision for the payment of the laborers or other employés upon the work entrusted to him, nor were any means provided for the compensation of the receiver, for the settling of his accounts, or in any manner closing up his trust. It is safe to say that so extraordinary a writ as the writ of supersedeas issued in this case has not before been issued by any court. The United States circuit court of appeals, in its decision in this matter, in endeavoring to justify this unprecedented proceeding, ignores all of the decisions of the Supreme Court of the United States, and loses sight of the difference between supersedeas as understood in the Federal courts and in certain of the State courts, and bases its decision upon the case of State *vs.* Johnson, 13 Fl., 33, which is entirely in conflict with Goddard *vs.* Ordway, *supra*. The State courts,

however, are not uniform, as is shown by the decisions in the following cases:

Bristow *vs.* Home Bldg. Co., 20 S. E., 946 (Va.).
In re Real Estate Assn., 50 Cal., 388.
Swayne *vs.* Townsend, 20 O. St., 1.
Hought *vs.* Irwin, 31 Atl. R., 260 (Pa.).

The effect of supersedeas arising by operation of law in the Federal courts is simply to stay proceedings where they are at the time the supersedeas becomes effective, and this is the supersedeas intended to be covered by Rule 36; and even if it be conceded that a supersedeas by operation of law arose in this case on the 14th of September, 1900, upon the filing of the citation in the district court for the district of Alaska, still the receiver fully complied with all the requirements of such supersedeas. It appears, without denial, that he immediately discharged his men, stopped work upon the mines, the defendants took possession of them, and that the lower court made an order staying the proceedings and providing that the gold that had been extracted from the mines by the receiver should remain in safe-deposit vaults, and that the receiver should not have access thereto.

The Alaska court acted entirely in accordance with the rules governing supersedeas. We have inserted these authorities simply because the court of appeals, in its opinion, has discussed the matter and declined to follow the rule of this court, but has followed that of the supreme court of Florida. This, however, is really immaterial to this controversy for the reason that the receiver here was not charged in the affidavits upon which he was arrested with violating a statutory supersedeas, nor was he convicted by the court of violating a statutory supersedeas, but he was

charged and convicted solely of the violation of the *writs* issued upon the order of Judge Morrow, which *writs*, as we have heretofore shown, were issued entirely without authority of law.

VII.

It will undoubtedly be conceded that, if the writ of supersedeas was void for any of the reasons above stated, petitioner could not be punished for its violation.

This was conceded upon the argument in the court below, and is elementary. Section 725 of the Revised Statutes of the United States, which gives power to punish for contempt, applies to all courts of the United States, and provides that the courts may punish for contempt for the disobedience of their authority by any officer, party, juror, witness, or other person, to any *lawful* writ, process, order, decree, or command.

In *Ex parte* Robinson, 19 Wall., 505, this court had under consideration this statute, and said that the powers and duties of the courts of the United States were limited by the act of Congress. If an order made by a court is simply erroneous, but the court making it has jurisdiction, then the party is not justified in disobeying the order, but should apply to have the order set aside; but if the order is void for want of jurisdiction, disobedience to it is not a contempt.

Harris *vs.* Haines, 35 Mich., 138.
Perry *vs.* Mitchell, 5 Denio, 537.
People *vs.* O'Neal, 47 Cal., 109.
Brown *vs.* Moore, 61 Cal., 432.
In re Norton, 10 Mich., 208.
People *vs.* Sturtevant, 9 N. Y., 263.
Ex parte Grace, 12 Iowa, 208.
State *vs.* Harper's Ferry Bridge Co., 16 W. Va., 64.
Rapalje on Contempt, sec. 16–33.

For the foregoing reasons we respectfully submit that this court should issue its writ of *habeas corpus*, requiring the production of the body of petitioner before it; and should, also, issue a writ of certiorari, addressed to the United States circuit court of appeals for the ninth circuit; and that, upon the hearing of said matters, the petitioner should be discharged.

J. M. WILSON,
T. J. GEARY,
C. A. SEVERANCE,
F. B. KELLOGG,
Attorneys for Petitioner.

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SUPREME COURT OF THE UNITED STATES.

IN RE ALEXANDER MCKENZIE, PETITIONER.

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Alexander McKenzie, a citizen of the United States and of the State of North Dakota, respectfully shows:

That he is unlawfully and unjustly held in custody, imprisoned, detained, and restrained of his liberty by Oscar L. Rogers, sheriff of Alameda county, California, at Oakland, in the county of Alameda.

Your petitioner further states that on the 23rd day of July, 1900, he was, by Arthur H. Noyes, judge of the district court of Alaska, 2nd division, duly appointed receiver of the property involved in an action then pending in said court, entitled L. F. Melsing *et al. vs.* John I. Tornanses, and was directed by the order, so appointing him as receiver, to take possession of and operate a certain placer mining claim situated on Anvil creek, near Nome, in the district of Alaska; that a copy of the order so appointing him is hereto attached, marked Exhibit A, page 22; that he duly qualified as such receiver, took possession of and operated said mine, and was engaged in operating the same continuously from the time of his appointment down to and including the 14th day of September, 1900.

That on the 29th day of August, 1900, an appeal from said order so appointing him receiver was allowed by the Honorable W. W. Morrow, judge of the circuit court of the United States, for the northern district of California.

That a citation on such appeal was on such date signed by the said W. W. Morrow, judge, as aforesaid, and a supersedeas bond approved; that none of these papers were filed with the clerk of the district court of Alaska, 2nd division, until the said 14th day of September, 1900; that on the said 29th day of August, 1900, the clerk of the United States circuit court of appeals for the ninth circuit issued a writ of supersedeas, a copy of which is found on page 16 of Exhibit No. A, hereto attached and made a part hereof.

That thereafter and on the 14th day of September, 1900, a copy of such writ of supersedeas was served on your petitioner at Nome, Alaska; that your petitioner immediately ceased operations on said properties so taken possession of by him as such receiver under and in obedience to the order of the district court of Alaska, 2nd division, but that your petitioner then and there refused to deliver to the defendants in said action the gold and gold dust then in his possession as receiver, and which had come to his possession from operating said properties.

That thereafter, on the 1st day of October, 1900, the United States circuit court of appeals for the ninth circuit made and entered an order directing the United States marshal of the northern district of California to attach the person of the said Alexander McKenzie, and produce him before the United States circuit court of appeals for the ninth circuit, at the city and county of San Francisco, State of California, to answer to his refusal to obey the said writ of supersedeas hereinbefore referred to; that this matter came on regularly to be heard, and on the 11th day of February, 1901, the said United States circuit court of appeals, ninth circuit, ordered and adjudged your petitioner guilty of contempt of said court, and adjudged that he be imprisoned in the county jail of Alameda county, California, for the period of six months, and that by virtue of said judgment and in obedience to it he is now confined in the county jail of Alameda county, California, by Oscar L. Rogers, sheriff of Alameda county, California.

Your petitioner further states and alleges, as he is advised, that the said United States circuit court of appeals for the ninth circuit had no jurisdiction or lawful authority to cause the arrest of your petitioner, or to proceed against him in the manner and form aforesaid, and that the said pretended process, arrest, order, trial, and judgment and warrant whereby your petitioner was committed to the custody of the said Oscar L. Rogers, sheriff, as aforesaid, and whereby he is held in the custody of the said Oscar L. Rogers, sheriff, as aforesaid, and imprisoned and restrained of his liberty, were and are, each and all of them, wholly without authority of law, in violation of law and of the just rights of your petitioner.

That on the 29th day of August, 1900, the said circuit court of appeals for the ninth circuit was without authority of law to issue said writ of supersedeas, so called, or order the said writ to issue, for that it did not then have jurisdiction of the action entitled L. F. Melsing *et al. vs.* John I. Tornanses, as at that time no appeal had

been taken to the said court in the said case, of L. F. Melsing *vs.* John I. Tornanses, or from any order made or entered in said cause by the district court of Alaska, 2nd division, because:

(*a.*) On said 29th day of August, 1900, no appeal had been taken in said cause from the district court of Alaska, 2nd division, to the circuit court of appeals for the ninth circuit, for on said date neither the order allowing the appeal nor the assignment of errors, nor the undertaking on appeal, nor citation, had been filed with the clerk of the district court for the district or Alaska, 2nd division, and no appeal had been allowed by said court or the judge thereof.

(*b.*) That on the 1st day of October, 1900, when the warrant for the arrest of your petitioner was issued, the circuit court of appeals for the ninth circuit was entirely without jurisdiction in the above-entitled cause, for on said date neither the order allowing the appeal nor any assignment of errors or undertaking on appeal had been filed with the clerk of the district court of Alaska, 2nd division; and, further, that on said date the above-entitled cause had not been docketed in the circuit court of appeals for the ninth circuit, nor the record in said cause filed therein, and the return day of the appeal, as designated in the order allowing the appeal herein, and citation signed by the Honorable W. W. Morrow, the judge allowing said appeal, had passed, and there had been no extension of the time to file such record.

That the said circuit court of appeals for the ninth circuit has been at all times without jurisdiction in the action of L. F. Melsing *et al. vs.* John I. Tornanses, or of any order made therein, for that no appeal to said honorable court from the district court of Alaska has ever been taken in the above-entitled action or from any order made therein by said district court of Alaska, and that neither the order allowing an appeal signed by the Honorable W. W. Morrow on the 29th day of August, 1900, or any assignment of errors in said matter, nor any undertaking upon appeal has at any time been lodged or filed with the clerk of the said district court of the district of Alaska.

That the paper entitled a writ of supersedeas annexed hereto was issued by the clerk of the circuit court of appeals, ninth circuit, on the order of the Honorable W. W. Morrow, circuit judge for the ninth circuit, and as such judge and not otherwise; that the said Honorable W. W. Morrow, circuit judge as aforesaid, was without authority of law to order the issuance of said writ, for that the same

should only be issued, if at all, by the United States circuit court of appeals for the ninth circuit, acting as a court, and power to issue the same was not vested in the individual judges thereof; therefore said order of said Honorable W. W. Morrow, circuit judge as aforesaid, and the said writ issued in obedience to his order, was and is void.

Defendant alleges that on the dates when it is alleged in the affidavits on which the warrant for the arrest of this defendant was issued this defendant failed to obey said writ of supersedeas said writ of supersedeas was inoperative and void, for that no appeal had been taken to said court in the action entitled L. F. Melsing *et al.* vs. John I. Tornanses.

That the United States circuit court of appeals for the ninth circuit and the judges thereof were without authority to issue or direct the issuance of the writ of supersedeas individually in this case, inasmuch as said writ went beyond the proper scope of such writ and nullified the order of the lower court instead of directing a mere stay of proceedings.

A judge of the circuit court of appeals for the ninth circuit had no power to grant the supersedeas staying the proceedings in the court below herein, for the reason that such power was vested exclusively in the district court of Alaska; that the said court of appeals for the ninth district was and is without jurisdiction in the premises, because:

(*a.*) There is no provision of law authorizing an appeal from an interlocutory order from the district court of Alaska appointing a receiver, or from an order refusing to discharge a receiver, and said appeal was not taken or attempted to be taken within the time limited by law.

(*b.*) Because the order in question made by the district court of Alaska is an interlocutory order appointing a receiver, and not an interlocutory order granting an injunction or refusing to dissolve an injunction.

That the United States circuit court of appeals for the ninth circuit did not authorize or direct the issuance of the paper entitled a writ of supersedeas, which it is claimed this defendant disobeyed, and which was issued by the clerk of the circuit court of appeals, ninth circuit, on the 29th day of August, 1900, and that the same was issued by said clerk without authority of law and was and is void.

Your petitioner hereto attaches a copy of the record on appeal in

said cause, and a copy of the record in the matter of his alleged contempt and a copy of the testimony submitted in the trial of said alleged contempt, marked Exhibits A, B, [redacted] C and D.

Wherefore your petitioner prays that a writ of *habeas corpus* may be issued out of and under the seal of this honorable court, to be directed to the said Oscar L. Rogers, sheriff of the county of Alameda, State of California, commanding him to have the body of your petitioner, together with return of the date and cause of his detention, before this honorable court on a day to be designated therein, and that a writ of certiorari issue, directed to the said United States circuit court of appeals, ninth circuit, commanding them to certify and send to this court, on a certain day to be therein designated, a full and complete transcript of the process, record, and proceedings by and before them touching the matter of your petitioner's said arrest, detention, and imprisonment, or that your petitioner may have such other or further full and adequate relief in the premises as to this court may seem appropriate, and that he may be discharged from said custody and imprisonment, and your petitioner will ever pray, etc.

ALEXANDER McKENZIE,
Petitioner.

JEREMIAH M. WILSON,
THOS. J. GEARY,
C. A. SEVERANCE,
F. B. KELLOGG,
Attorneys for Petitioner.

STATE OF CALIFORNIA, *County of Alameda,* } ss:

Alexander McKenzie, being first duly sworn, deposes and says: That he is the petitioner in the above-entitled matter; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and that as to those matters he believes it to be true.

ALEXANDER McKENZIE.

Subscribed and sworn to before me this 12th day of February, 1901.

[SEAL.] J. B. LANKTREE,
Notary Public in and for said County of Alameda, State of California.

STATE OF CALIFORNIA, } ss:
County of Alameda, }

I, Frank C. Jordan, county clerk of the county of Alameda, State of California, and *ex officio* clerk of the superior court of said county (which is a court of record), do hereby certify that J. B. Lanktree, whose name is subscribed to the foregoing affidavit, was at the time of taking such affidavit and administering the oath therein referred to a notary public in and for said county of Alameda, duly commissioned and qualified and authorized by law to administer, take, and certify the same in said county, and full faith and credit are due to all his official acts as such notary public.

And I do further certify that I am well acquainted with the handwriting of said J. B. Lanktree and verily believe that his signature to the foregoing jurat to said affidavit is genuine, and that said instrument was sworn to and certified according to the laws of the State of California.

In witness whereof I have hereunto set my hand and affixed the seal of said superior court, at my office, in the city of Oakland, county of Alameda, this 12th day of Feb'y, A. D. 1901.

[Seal Superior Court, Alameda County, California.]

FRANK C. JORDAN,
County Clerk and Clerk of the Superior Court of Alameda County.

[Endorsed:] In the Supreme Court of the United States. In re Alexander McKenzie, petitioner.

EXHIBIT A.

In the United States Circuit Court of Appeals for the Ninth Circuit.

JOHN I. TORNANSES, Appellant,
vs.
L. F. MELSING, H. L. BLAKE, D. B. LIBBY, W. T. HUME, and O. P. Hubbard. } No. 634.

Transcript of Record.

In the matter of the alleged contempt of Alexander McKenzie.

In the United States Circuit Court of Appeals for the Ninth Circuit.

JOHN I. TORNANSES ET AL., Defendants and Appellants,
vs.
L. F. MELSING ET AL., Plaintiffs and Respondents.

Petition for Order Enforcing Supersedeas and for Order of Attachment.

The petition of the above-named John I. Tornanses *et al.*, defendants and appellants in the above-entitled cause, respectfully shows to the court:

That on the 29th day of August, 1900, your petitioners applied to the Honorable W. W. Morrow, one of the judges of this honorable court, to allow an appeal in the said matter from the decree of the district court of the United States for the district of Alaska, second division. That on said day, the said Honorable W. W. Morrow, judge as aforesaid, allowed an appeal from the said district court in said cause to this court, and thereupon, at the request and on motion of petitioners, granted an order that a writ of supersedeas issue in the said matter, which order was duly filed in this court, where it now remains. Based upon the said order, a writ of supersedeas was duly issued, signed by the clerk and attested with the seal of this court, directed to Arthur H. Noyes, judge of the said district court of Alaska, and to Alexander McKenzie, receiver in the above-entitled cause, directing and commanding them to stay all proceedings in said cause until the determination of the said appeal then allowed in this court, and further directing and commanding them to return to these appellants all property which had come into the possession of the said Alexander McKenzie, receiver in said cause.

That immediately thereafter, and as soon as the said orders could reach the city of Nome, at which place said court was then being held, and on, to wit, the 14th day of September, 1900, duly certified copies of the said order and the original writ were by the marshal of the district court of Alaska served upon the said Arthur H.

Noyes, judge as aforesaid, and the said Alexander McKenzie, receiver as aforesaid, and demand was made by these appellants upon the said judge that an order be made in the said cause requiring the said receiver to conform to the directions and commands of the writ of this honorable court, and demand was further made upon the said McKenzie, receiver as aforesaid, that he return to the appellants, as directed and commanded by the order and writ of this court, all of the said property in said writ referred to. That the said Noyes, judge as aforesaid, has utterly refused to make any order whatever in the premises upon the said receiver, and the said receiver has utterly refused to surrender the said property then in his possession to these appellants, as directed and commanded by the said order and the said writ, all of which more fully appears in and by the affidavit of Samuel Knight, Esq., an attorney of this court, which is hereto annexed, hereby referred to, and made a part of this petition.

Wherefore, your petitioners pray the further order of this court, in aid of the said writ of supersedeas, that the marshal of this court be directed and commanded forthwith to proceed to the said city of Nome in the said district of Alaska, and there to require of the said McKenzie, receiver, that he obey the said order and writ of this court, and that all of the said property whereof he took and obtained possession in the said action, including all gold dust and other valuables which he may have obtained from the working of the property involved in the said suit, be by him restored to these appellants, as required by the said order.

That an order be made upon the said McKenzie, receiver as aforesaid, that he forthwith show cause before this court why he should not be punished for contempt for the disobedience so manifested by him in refusing to obey the order and writ issued in this court as aforesaid, requiring him to return to the appellants the property described in the said writ, and that the said marshal be required to take the said Alexander McKenzie into his custody and bring him to the bar of this court to answer upon the charge aforesaid, and that the said marshal be by this court authorized to apply, if necessary, for aid in the carrying out of the order of this court to the commander of the troops of the United States stationed at Nome.

And your petitioners will ever pray, etc.

PAGE, McCUTCHEN,
HARDING & KNIGHT,
Attorneys for Defendants and Appellants.

In the United States Circuit Court of Appeals for the Ninth Circuit.

JOHN I. TORNANSES ET AL., Defendants and Appellants,
vs.
L. F. MELSING ET AL., Plaintiffs and Respondents.

Affidavit of Samuel Knight.

UNITED STATES OF AMERICA,
District of Alaska, Second Judicial Division, } ss:

Samuel Knight, being duly sworn, deposes and says that he is an attorney-at-law and a member of the law firm of Page, McCutchen, Harding & Knight, and as such attorney has had charge, on behalf of the defendants, of the above-entitled case in the United States district court for the district of Alaska, in the second judicial division thereof.

That heretofore, and on the 21st day of August, 1900, an amended bill of complaint was served herein upon affiant in which, among other changes, C. D. Lane and the Wild Goose Mining and Trading Company are made parties defendant herein.

That on the 14th day of September, 1900, he received the following papers:

Duly certified copies of petition herein to said United States circuit court of appeals for an order allowing an appeal from certain orders, judgment, and decree of said United States district court, with duly certified copies of order of the former court herein allowing such appeal; duly certified copies of assignments of errors made and filed in said appellate court herein; original and duly certified copies of citation issued out of and under the seal of the court last named directed to the above-named respondent; original and duly certified copies of writ of supersedeas herein, issued out of and under the seal of said circuit court of appeals, and duly certified copies of bond for such supersedeas, duly approved by a judge of said circuit court of appeals.

And thereafter and upon the same day the marshal for the district of Alaska, second division, in which the above-entitled case is now and was then pending (except so much thereof as is embraced therein the appeal above mentioned), and from certain orders, judgment, and decree of which said United States district court said appeal was taken to and allowed by said appellate court, received from me and duly served upon the persons hereinafter named the following papers respectively:

Upon Arthur H. Noyes, judge of said district court, said duly certified copy of writ of supersedeas; upon Alexander McKenzie, appointed as receiver by said district court, said duly certified copy of writ of supersedeas, and a written demand in accordance with said writ of supersedeas for the immediate possession of all property, real

and personal, taken and now held by him, acting in his capacity as such receiver; upon Messrs. Hubbard, Beeman & Hume, attorneys for plaintiffs in said district court, respondents herein, said duly certified copies being one of each of the following papers: Said writ of supersedeas, said citation, said assignment of errors, said petition for appeal, and said order allowing such appeal.

Upon one Whitehead, manager of the Alaska Banking and Safe Deposit Company in the vaults whereof the gold dust is situated, received by said Alexander McKenzie resulting from the operation and working of the placer mining claim involved herein known as No. 10 Above Discovery on Anvil creek in the Cape Nome mining district, district of Alaska, and of which said mining claim said McKenzie was appointed as such receiver hereof by said United States district court, said duly certified copy of writ of supersedeas.

And upon the person in the immediate charge and control of said placer mining claim, said certified copy of writ of supersedeas.

That thereafter, and on said 14th day of September, 1900, affiant filed in the office of the clerk of said United States district court the following papers: Said original citation; said original writ of supersedeas; said certified copy of a bond for said writ; said certified copy of petition for an order allowing appeal; said certified copy of order allowing such appeal and supersedeas; said certified copy of assignment of errors.

That in and by said written demand, so served upon Alexander McKenzie, as such receiver as aforesaid, Mr. Theo. Allen was named and designated as the agent of the above-named defendants and appellants to receive the property so taken and held by said receiver as aforesaid.

That thereafter and on said 14th day of September, 1900, affiant interviewed said Arthur H. Noyes, judge of said district court, and then and there requested him to make and render an order herein, the form whereof had been theretofore prepared by affiant, directing said receiver to obey said writ of supersedeas and deliver to said defendants and appellants by their duly authorized agent as aforesaid, all property taken and then held by said McKenzie; but said Arthur H. Noyes then and there declined to make the order last hereinabove mentioned, or any order herein or take any steps for the enforcement of said writ of supersedeas and then and there refused to direct said Alexander McKenzie, as such receiver or otherwise, to return to said defendants and appellants the property so taken and held by him as aforesaid, or any part thereof, stating as his reason for such refusal, that the said United States circuit court of appeals had taken from him all power to act in the matter, and that it was necessary for the parties hereto and said receiver to settle the matter among themselves.

That thereafter, on the 15th day of September, 1900, affiant and said Theo. Allen again demanded of said McKenzie that he return to said defendants through said Allen the property so taken and held by him as aforesaid; but said McKenzie then and there de-

clined to comply with said demand, or with the terms and directions in said writ of supersedeas contained until he should be advised by his attorney hereinafter named to obey said writ and turn over said property.

That affiant requested of C. L. Vawter, United States marshal, of said district and division, on said 14th day of September, 1900, and thereafter, to assist said defendants and appellants herein to recover and to deliver to them possession of said property so held by said McKenzie as aforesaid; but said marshal declined to take any steps to enforce said writ of supersedeas or the order upon which the same was made, alleging that it was not his duty so to do.

Thereupon, and on the said 15th day of September, 1900, affiant and defendants and appellants herein made application to Major Van Arsdale, of the military authorities at Nome, Alaska, to assist them in obtaining possession of said property under said writ of supersedeas. That at such application said Alexander McKenzie was present in person and by his attorney, Thomas J. Geary, upon request of said Van Arsdale, at which time said Geary contended that said writ of supersedeas was void and of no effect whatever, and declined to advise said military authorities and said McKenzie that said property should be returned to defendants and appellants; and said Major Van Arsdale, after considering said application and calling upon said Noyes immediately thereafter, directed that the enforcement of said writ should be held in abeyance by the military authorities, as he stated said Noyes promised him at such time that he, said Noyes, as judge aforesaid, would order said writ to be obeyed.

Affiant is informed and believes, and therefore alleges the fact to be, that said Geary declines to advise said McKenzie to deliver all of said property to defendants and appellants and obey said writ, and said McKenzie has continually refused and now does refuse to carry out the provisions of the same and return said property to defendants and appellants, and affiant believes that to make the process and orders of said circuit court of appeals effective within the second judicial division of the district of Alaska, under the circumstances there existing at the present time, it will be necessary for said circuit court of appeals to have the same served and carried into effect by its own officers thereunto duly authorized.

That according to the climatic conditions prevalent in the northwestern portion of Alaska, embracing the second judicial division of the district of Alaska, the ordinary channels of communication by mail or otherwise will be closed in the latter part of October, 1900, and affiant is informed and verily believes the fact to be that it is the intention of said Arthur H. Noyes and said Alexander McKenzie to postpone taking any action whatever upon the orders and process of said circuit court of appeals until sufficient time shall have elapsed so as to render it impossible to compel their attendance before the court last named until the said channels of communication shall have been reopened, which, under ordinary circumstances, cannot take place until on or about the 15th day of May, 1901.

That on the evening of September 15th, 1900, affiant again demanded of said Arthur H. Noyes that he should make an order providing for the enforcement of said writ and the return of said property as aforesaid, and handed said Noyes at such time a form of order ready to be signed wherein it was only provided that such writ should be enforced and all of such property returned; but said Noyes then and there again refused to sign said proposed order, and stated as his reasons for so doing that the order, judgment and decree of said district court so appealed from as aforesaid was in his opinion non-appealable; that defendants and appellants had taken an unwarrantable, or "suspicious" (as he termed it) advantage of the fact that the order, judgment, and decree so appealed from contained an injunction as well as an order appointing a receiver, and said Noyes has refused and still does refuse to direct said McKenzie to return the property so taken by him as aforesaid, although he stated in general terms he would, acting as such judge, make an order which he had directed the clerk to prepare, carrying out the provisions of said writ as he construed it.

That said Alexander McKenzie has repeatedly admitted to affiant and others that there is a large quantity of gold dust, aggregating in value many thousands of dollars, constituting the proceeds derived from the operation by him of said mining claim and stored in boxes in the the vaults of the Alaska Banking and Safe Deposit Company at Nome, of which said McKenzie has the sole control and to which he is the only person who has access and to which none of these defendants have or are allowed any access whatever without resorting to force.

And on the said 14th day of September, 1900, acts of violence occurred in and about the Alaska Banking and Safe Deposit Company where said gold dust is stored, as aforesaid, by reason of a physical attempt made by said McKenzie to apparently obtain access to said gold dust, and he has been forcibly prevented from so doing by the various parties defendant in the so-called Anvil Creek litigation (in all of which said McKenzie was appointed receiver of the property of every character, therein involved), including the above-named defendants and appellants acting by affiant and others. That said bank is now guarded and watched inside and out by armed men, including a detachment of United States soldiers, which said condition of matters is entirely due to the refusal of said judge or district court and said McKenzie to comply entirely with the provisions of said writ by delivering thereunder said gold dust to defendants and appellants herein and the latter's desire to have said writ properly obeyed by the persons and officers to whom it is directed.

That on the morning of the 17th day of September, 1900, affiant, in open court, requested said Noyes to then and there state whether he had made or intended to make any order herein for the purpose of enforcing the provisions of said writ of supersedeas, and said Noyes replied thereto that an order would be made and filed herein

today "to carry out the order of the circuit court of appeals," as he expressed it; but up to the closing hours of the office of the clerk of said district court today no order had been filed herein to carry out the provisions of said writ, and affiant is informed and believes from reading a proposed order drawn up for said Noyes' signature by some one employed by said Noyes so to do that the latter will merely direct a stay of proceedings upon the order so appealed from, as aforesaid, but will not direct said McKenzie to restore to defendants and appellants, or any thereof, any of said property.

That the latter have been obliged to retake forcible possession of the said mining claim, for the reasons heretofore stated.

SAMUEL KNIGHT.

Subscribed and sworn to before me this 17th day of September, 1900.

[SEAL.] H. L. ATKINSON,
Notary Public in and for the District of Alaska.

In the United States Circuit Court of Appeals for the Ninth Circuit.

JOHN I. TORNANSES ET AL., Defendants and Appellants,
vs.
L. F. MELSING ET AL., Plaintiffs and Respondents.

Affidavit of Theo. Allen.

UNITED STATES OF AMERICA,
District of Alaska, Second Judicial Division, } ss:

Theo. Allen, being duly sworn, deposes and says that he is an employee of The Wild Goose Mining and Trading Company, one of the defendants and appellants herein, and was designated in a written as well as oral demand served and made on the 14th and 15th days of September, 1900, respectively upon Alexander McKenzie, theretofore appointed as receiver herein by the United States district court for the district of Alaska, second division thereof, as the agent and person to whom the said Alexander McKenzie, as receiver herein, should deliver to said defendants and appellants all property taken and held by him as such receiver from the possession of said defendants and appellants; that on said 15th day of September, 1900, together with Mr. Samuel Knight of the law firm of Page, McCutchen, Harding & Knight, attorneys for said defendants and appellants, he called upon said Alexander McKenzie, and with said Knight made demand that said property be restored by said McKenzie to said defendants and appellants through affiant. That said McKenzie then and there replied that he would not deliver the same to affiant or any one else without the opinion of his attorney, Thomas J. Geary, so to do, and defendants and appellants have not nor have any of them received any gold dust, money, or other per-

sonal property held by said McKenzie as such receiver, although the latter admitted at such time that there was then considerable gold dust stored in certain safe-deposit boxes in the vaults of the Alaska Banking and Safe Deposit Company at Nome, to which said McKenzie and no one else had and now has access, and which is held by him as such receiver.

That according to the climatic conditions prevalent in the northwestern portion of Alaska, embracing the second judicial division of the district of Alaska, the ordinary channels of communication by mail or otherwise will be closed on or about the 20th day of October, 1900. And affiant is informed and verily believes the fact to be that it is the intention of said McKenzie and of Arthur H. Noyes, judge of the district court of the United States in and for the district of Alaska, second judicial district, to postpone taking any action whatever upon the order and process of said circuit court of appeals issued in this cause until sufficient time shall have elapsed so as to render it impossible to compel their attendance before the court last named until the said channels of communication shall have been reopened, which, under ordinary circumstances, cannot take place until on or about the 15th day of May, 1901.

THEO. ALLEN.

Subscribed and sworn to before me this 17th day of September, 1900.

[SEAL.] H. L. ATKINSON,
Notary Public in and for the District of Alaska.

In the United States Circuit Court of Appeals for the Ninth Circuit.

JOHN I. TORNANSES, Defendant and Appellant,
vs.
L. F. MELSING ET AL., Plaintiffs and Respondents.

Affidavit of C. D. Lane.

UNITED STATES OF AMERICA,
District of Alaska, Second Judicial Division, } ss:

C. D. Lane, being first duly sworn, deposes and says that he is the president of the Wild Goose Mining and Trading Company, the owner of the placer mining claim known as claim No. 10 Above Discovery on Anvil creek in the Cape Nome mining district, which said company is impleaded as a defendant in the United States district court for the district of Alaska, second judicial division thereof, in and by an amended complaint heretofore filed herein and served on the 21st day of August, 1900.

That one Alexander McKenzie, claiming to act as receiver of said claim, has extracted therefrom gold dust aggregating in value the sum of $14,000, and has sold, as affiant is informed, about $6,900 in

value thereof. Said McKenzie has admitted by his verified petition filed in said district court on the 10th day of September, 1900, that there was then in his possession 207 ounces of gold dust, which had been extracted from said mining claim of the value of $3,312.

That said McKenzie has continuously thereafter operated said claim up to and including the 15th day of September, 1900, and further has extracted from said mining claim 251 ounces of gold dust of the value of $4,016.

That said McKenzie has sold under an order obtained *ex parte* from the judge of said United States district court, $— worth of gold dust to pay the expenses of said property, and that there is now in his possession as such receiver fully 458 ounces of gold dust worth $7,328.

That said McKenzie has continuously refused and now does refuse to turn over to said Wild Goose Mining and Trading Company or any of the defendants herein the gold dust so held by him as aforesaid or any part thereof, but continues to keep the same locked up in boxes in the vaults of the Alaska Banking and Safe Deposit Company, to which none of these defendants have or are allowed any access whatever.

And affiant states upon his information and belief that in order to make effective the process and orders of said circuit court of appeals within the second judicial division of the district of Alaska, under the circumstances existing at the present time it will be necessary for said circuit court of appeals to have the same served and carried into effect by its own officers thereunto duly authorized.

Affiant further states that according to the climatic conditions prevalent in the northwest portion of Alaska, embracing the second judicial division of the district of Alaska, the ordinary channels of communication by mail or otherwise will be closed on or about the 20th day of October, 1900, and affiant is informed and verily believes the fact to be that it is the intention of said Arthur H. Noyes and said Alexander McKenzie to postpone taking any action whatever upon the orders and process of said circuit court of appeals until sufficient time shall have elapsed so as to render it impossible to compel their attendance before the court last named until the said channels of communication shall have been reopened, which, under ordinary circumstances, cannot take place until on or about the 15th day of May, 1901.

C. D. LANE.

Subscribed and sworn to before me this 17th day of September, 1900.

[SEAL.] H. L. ATKINSON,
Notary Public in and for the District of Alaska.

(Endorsed:) No. 634. United States circuit court of appeals, ninth circuit. John I. Tornanses *et al.*, defendants and appellants, *vs.* L. F. Melsing *et al.*, plaintiffs and respondents. Petition for order enfor-

cing supersedeas and for order of attachment. Filed Oct. 1, 1900. F. D. Monckton, clerk. Page, McCutchen, Harding & Knight, attorneys for appellants, Mills building, San Francisco, Cal.

United States Circuit Court of Appeals for the Ninth Circuit.

JOHN I. TORNANSES, Appellant,
vs.
L. F. MELSING ET AL., Appellees. } No. 634.

Order Approving Form of Writ of Supersedeas, etc.

A form of writ of supersedeas to be issued in the above-entitled cause, pursuant to the order for such issuance this day made, having been drawn by Messrs. Page, McCutchen, Harding & Knight, counsel for the appellant, and approved by me—

It is ordered that the clerk forthwith sign and seal said form of writ as so drawn and approved.

August 29, 1900.

WM. W. MORROW,
Circuit Judge.

(Endorsed:) No. 634. United States circuit court of appeals for the ninth circuit. John I. Tornanses, appellant, *vs.* L. F. Melsing *et al.* Order approving form of writ of supersedeas and that clerk sign and seal same. Filed August 29, 1900. F. D. Monckton, clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

L. F. MELSING, H. L. BLAKE, D. B. LIBBY, W. T. HUME, and O. P. Hubbard, Complainants,
vs.
JOHN I. TORNANSES, Defendant and Appellant.

Writ of Supersedeas. (*Clerk's Copy.*)

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Arthur H. Noyes, judge of the district court for the district of Alaska, second division, and to F. L. Melsing, H. L. Blake, D. B. Libby, W. T. Hume, O. P. Hubbard, and Alexander McKenzie, Greeting:

Whereas, in the above-entitled cause appellant has petitioned this court for an order allowing an appeal to this court from an interlocutory order, judgment and decree given and rendered herein on the 23d day of July, 1900, by the district court for the district of Alaska, second division, granting unto complainants herein an in-

junction ordering and directing the defendant and appellant to cease from working a certain mining claim in said bill of complaint mentioned, called No. 10 Above Discovery, on Anvil creek, situated within said district of Alaska, and also ordering and directing said defendant to turn over the possession of said mine unto the said Alexander McKenzie as receiver thereof, and also ordering and directing said receiver to take possession of said mine and mining property and to conduct and work the same as receiver thereof, together with such other and various things as are in said order provided, and also allowing an appeal from the order made and entered by said court in said action on the 10th day of August, 1900, by which said court denied appellant's motion to vacate and set aside said first-named order, judgment and decree, and has also in said petition prayed for a writ of supersedeas, and said appeal having been by said circuit court of appeals allowed, and said petition for a writ of supersedeas granted upon the appellants filing a bond in the sum of $20,000 to be approved by this court, and said bond in the sum of $20,000 with approved sureties having been filed and approved by this court:

Now, therefore, you, the said L. F. Melsing, H. L. Blake, D. B. Libby, W. T. Hume, O. P. Hubbard, Alexander McKenzie and Arthur H. Noyes, judge of said district court for the district of Alaska, second division, and each of you, are hereby commanded that from every and all proceedings on any execution of the aforesaid order, or in anywise molesting said defendant and appellant on the account aforesaid, or in any manner interfering with his possession of said property, you entirely surcease and refrain as being superseded, and that you, the said Alexander McKenzie, do forthwith return unto said defendant the possession of any and all property of which you took possession under and by virtue of said order, and that you do make return of this supersedeas together with your acts and doings thereon to said district court for the district of Alaska, second division, as you will answer the contrary at your peril, and you, the judge of said district court for the district of Alaska, second division, are hereby commanded to stay any and all proceedings which may have issued as aforesaid upon said order, and to stay any and all further proceedings in relation to said order and the appointment of a receiver thereunder in this case pending the appeal last aforesaid to this court.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States this 29th day of August, in the year of our Lord one thousand nine hundred.

[SEAL.]

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

(Endorsed:) No. 634. Dep't 7. United States circuit court of appeals for the ninth circuit. L. F. Melsing *et al.*, complainants, *vs.* John I. Tornanses, defendant and appellant. Writ of supersedeas.

Clerk's copy. Page, McCutchen, Harding & Knight, attorneys for appellant, Mills building, San Francisco, Cal.

United States Marshal's Return.

I hereby certify that I received the within certified copy of writ on the first day of October, 1900, and in obedience thereto, I proceeded to Nome, district of Alaska, and attached the person of Alexander McKenzie, therein mentioned, at Nome, Alaska, and now have him before this honorable court as I am instructed in the within order, and I further return that in obedience to the within writ, I enforced the writ of supersedeas, therein mentioned, by taking property therein mentioned from the possession of said Alexander McKenzie and placing it into the hands of the defendants, according to the receipt attached to writ in case of Kjellman *vs.* Rogers, No. 636, and made a part of this return, as I am commanded in said order to do.

San Francisco, Cal., November 7th, 1900.

JOHN H. SHINE,
U. S. Marshal,
By S. P. MONCKTON,
Office Deputy.

In the United States Circuit Court of Appeals in and for the Ninth Circuit.

JOHN I. TORNANSES, Defendant and Appellant,
vs.
L. F. MELSING ET AL., Complainants and Appellees.

Order Directing United States Marshal to Enforce Writ of Supersedeas, etc.

Whereas, on the 29th day of August, 1900, an order was made by the Honorable W. W. Morrow, one of the judges of this court in the above-entitled cause, allowing an appeal from the decree of the district court of the United States for the district of Alaska, second division, and a further order was made by said W. W. Morrow granting a supersedeas in the said action, and

Whereas, a writ of supersedeas based upon said order was thereupon issued from this court signed by the clerk thereof and attested by the seal thereof, to Arthur H. Noyes, judge of the said district court, and to Alexander McKenzie, receiver appointed by the said district court in the above-entitled cause, which writ was in the words following, to wit:

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Arthur H. Noyes, judge of the district court of the district of Alaska, second division, and to L. F. Melsing, H. L. Blake, D. B. Libby, W. T. Hume, O. P. Hubbard, and Alexander McKenzie, Greeting:

Whereas, in the above-entitled cause, appellant has petitioned this court for an order allowing an appeal to this court from an interlocutory order, judgment and decree given and rendered herein on the 23d day of July, 1900, by the district court for the district of Alaska, second division, granting unto complainant herein an injunction ordering and directing the defendant and appellant to cease from working a certain mining claim in said bill of complaint mentioned called No. 10 Above Discovery on Anvil creek, situate within said district of Alaska, and also ordering and directing said defendant to turn over the possession of said mine unto the said Alexander McKenzie, as receiver thereof, and also ordering and directing said receiver to take possession of said mine and mining property and to conduct and work the same as receiver thereof, together with such other and various things as are in said order provided, and also allowing an appeal from the order made and entered by said court in said action on the 10th day of August, 1900, by which said court denied appellant's motion to vacate and set aside said first-named order, judgment and decree, and has also in said petition prayed for a writ of supersedeas, and said appeal having been by said circuit court of appeals allowed, and said petition for a writ of supersedeas granted upon the appellant's filing a bond in the sum of $20,000, to be approved by this court, and said bond in said sum of $20,000, with approved sureties, having been filed and approved by this court:

Now therefore, you, the said L. F. Melsing, H. L. Blake, D. B. Libby, W. T. Hume, O. P. Hubbard, Alexander McKenzie and Arthur H. Noyes, judge of said district court for the district of Alaska, second division, and each of you, are hereby commanded that from every and all proceedings on any execution of the aforesaid order, or in anywise molesting the said defendant and appellant on the account aforesaid, or in any manner interfering with his possession of said property, you entirely surcease and refrain as being superseded, and that you, the said Alexander McKenzie, do forthwith return unto said defendant the possession of any and all property of which you took possession under and by virtue of said order, and that you do make return of this supersedeas, together with your acts and doings thereon to said district court for the district of Alaska, second division, as you will answer the contrary at your perii. And you, the judge of said district court for the district of Alaska, second division, are hereby commanded to stay any and all proceedings, which may have issued as aforesaid upon said order,

and to stay any and all further proceedings in relation to said order and the appointment of a receiver thereunder in this case pending the appeal last aforesaid to this court.

Witness, the Hon. Melville W. Fuller, Chief Justice of the United States, this 29th day of August, in the year of our Lord nineteen hundred.

[SEAL.] F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

And whereas it has been made to appear to the satisfaction of this court by affidavit that the said Alexander McKenzie has been served with the said writ, and that he has refused to comply with the orders therein contained; now, therefore,

It is ordered that the United States marshal of the northern district of California proceed forthwith to the city of Nome, in the district of Alaska, and that he then and there enforce the orders and provisions of the said writ of supersedeas.

And it is further ordered that he attach the person of the said Alexander McKenzie, and produce him before this court at the city and county of San Francisco, State of California, to answer for his refusal to carry out the orders and process of this court, and for his contempt thereof, on Monday, the 5th day of November, 1900.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing to be a full, true and correct copy of an order this day entered in the cause entitled John I. Tornanses, appellant, *vs.* L. F. Melsing *et al.*, No. 634, as the original thereof remains of record in my office.

Attest my hand and the seal of said circuit court of appeals at San Francisco, California, this 1st day of October, A. D. 1900.

[SEAL.] F. D. MONCKTON, *Clerk.*

(Ten-cent U. S. int. rev. stamp, canceled.)

(Endorsed:) No. 634. In the United States circuit court of appeals for the ninth circuit. John I. Tornanses, appellant, *vs.* L. F. Melsing *et al.* Certified copy order directing United States marshal to enforce writ of supersedeas and for attachment of Alexander McKenzie and marshal's return, etc. Filed Nov. 7, 1900. Certified. F. D. Monckton, clerk. Page, McCutchen, Harding & Knight, attorneys for —— ——, Mills building, San Francisco, Cal.

Recognizance of Alex. McKenzie.

UNITED STATES OF AMERICA, } ss:
Ninth Judicial Circuit, }

Whereas, the undersigned has been arrested, and is now held and detained to answer a charge of contempt of the circuit court of appeals for the ninth circuit for an allegal refusal on his part to obey a writ of supersedeas issued out of this court in the case of John I. Tornanses, appellant, *vs.* L. F. Mellsing *et al.*, appellees, now pending in said court, and whereas by an order made and entered in said cause by said court on the 7th day of November, 1900, the hearing of said charge of contempt has been continued and postponed, and the undersigned has been ordered released upon his own recognizance:

Now, therefore, the undersigned hereby agrees to personally appear before the said circuit court of appeals at such time as he shall be ordered and directed by said court to answer said charge of contempt, and he further agrees that he will at all times hold himself amenable to the order and process of said court during the pendency of said charge, and if convicted will appear for judgment and render himself in execution thereof.

In testimony whereof the undersigned has hereunto set his hand and seal this 8th day of November, 1900.

ALEXANDER McKENZIE.

(Endorsed:) No. 634. United States circuit court of appeals for the ninth circuit. John I. Tornanses *vs.* L. F. Melsing *et al.* Recognizance of Alex. McKenzie. Filed Nov. 8, 1900. F. D. Monckton, clerk.

EXHIBIT B.

In the District Court for the District of Alaska, Second Division.

L. F. MELSING, H. L. BLAKE, D. B. LIBBY, W. T. HUME, and O. P. Hubbard, Plaintiffs,
vs.
JOHN I. TORNANSES, Defendants.

Order Appointing Receiver.

Now, on this 23d day of July, A. D. 1900, comes the complainants, L. F. Melsing, H. L. Blake, D. B. Libby, W. T. Hume, and O. P. Hubbard, above set forth, and upon the complaint filed in said action on behalf of the complainants comes on for hearing the application of said complainants for the appointment of a receiver, and the same having been considered by the court and the court having been fully advised in the premises, it is now hereby—

Ordered, adjudged and decreed that Alexander McKenzie of Nome, Alaska, be, and he is hereby, appointed receiver to take charge of and manage and control the placer mining claim mentioned and described in said complaint, and the said receiver is hereby authorized and directed to take immediate possession of said placer mining claim and to manage, mine, and work the same, and perform such other acts and things in and about said premises as are authorized by law, and to preserve the gold and gold dust and proceeds resulting from the working and mining of said claim, and to dispose of the same, subject to the further orders of this court.

It is further ordered that the said receiver file with the clerk of this court a proper bond with sureties to be approved by the judge of this court, in the penal sum of five thousand dollars, conditioned for the faithful discharge of his duties as such receiver, and accounting for all the funds coming into his hands as such, according to the order of this court.

It is further ordered that the said defendants, and each and all of them, turn over and deliver to said receiver the immediate possession, control, and management of said placer mining claim, and that the said defendants, and each of them, are hereby restrained and enjoined until the further order of this court from interfering with the control or management of said receiver in the mining and working of said placer mining claim, or any part thereof, or from interfering in any manner whatever with the possession or management of any part of the said property over which said receiver is hereby appointed; or in interfering in any manner to prevent the discharge of his duties or of the operation of said property under the order of this court, until the further order of this court.

Dated this 23d day of July, A. D. 1900.

ARTHUR H. NOYES, *District Judge.*

(Endorsed:) (Original.) District court, district of Alaska. L. F. Melsing, plaintiff, *vs.* John I. Tornanses, defendant. Order appointing receiver. Filed in the U. S. district court, district of Alaska, second division, Aug. 8, 1900. Geo. V. Borchsenius, clerk. F. T. Merritt, deputy.

Exhibit C.

In the United States Circuit Court of Appeals in and for the Ninth Circuit.

L. F. Melsing, H. L. Blake, D. B. Libby, W. T. Hume, and O. P. Hubbard, Complainants,
vs.
John I. Tornanses, Defendant and Respondent.

Petition for Order Allowing Appeal.

Comes now the respondent herein, John I. Tornanses, and conceiving himself aggrieved by the interlocutory order, judgment, and decree given and rendered herein on the 23d day of July, 1900, in the district court of the district of Alaska, second division, by the Honorable Arthur H. Noyes, judge thereof, and filed in said court on the 8th day of August, 1900, wherein and whereby it was ordered and decreed as follows:

(Title of Court and Cause.)

Restraining Order.

Now on this 23d day of July, A. D. 1900, comes the complainants L. F. Melsing, H. L. Blake, D. B. Libby, W. T. Hume, and O. P. Hubbard above set forth, and upon the complaint filed in said action on behalf of the complainants comes on for hearing the application of said complainants for the appointment of a receiver, and the same having been considered by the court, and the court having been fully advised in the premises, it is now hereby—

Ordered, adjudged, and decreed that Alexander McKenzie of Nome, Alaska, be and he is hereby appointed receiver to take charge of and manage and control the placer mining claim mentioned and described in said complaint, and the said receiver is hereby authorized and directed to take immediate possession of said placer mining claim and to manage, mine, and work the same, and perform such other acts and things in and about said premises as are authorized by law, and to preserve the gold and gold dust and proceeds resulting from the working and mining of said claim, and to dispose of the same, subject to the further orders of this court.

It is further ordered that the said receiver file with the clerk of this court a proper bond with sureties to be approved by the judge of this court in the penal sum of five thousand dollars conditional for the faithful discharge of his duties as such receiver and accounting for all the funds coming into his hands as such, according to the order of this court.

It is further ordered that the said defendants and each and all of

them turn over and deliver to said receiver the immediate possession, control, and management of said placer mining claim, or any part thereof, or from interfering in any manner whatever with the possession or management of any part of the said property over which said receiver is hereby appointed; or in interfering in any manner to prevent the discharge of his duties or of the operation of said property under the order of this court, until the further order of this court.

Dated this 23d day of July, A. D. 1900.

ARTHUR H. NOYES,
District Judge.

Filed in the U. S. district court, district of Alaska, second division, Aug. 8, 1900.

GEO. V. BORCHSENIUS, *Clerk.*
F. T. MERRITT, *Deputy.*

And by the order made and entered herein on the 10th day of August, 1900, in the said district court of the district of Alaska, second division, by the said Honorable Arthur H. Noyes, judge thereof, wherein and whereby it was ordered and decreed as follows:

(Title of Court and Cause.)

Order Confirming Appointment of Receiver.

On reading the complaint and petition of the above-named plaintiffs and the affidavits in support thereof, and on reading the affidavits of the defendant herein in support of the motion asking for the discharge and dismissal of the receiver heretofore appointed in the above-entitled proceedings, and on hearing the oral arguments of the attorneys for the several parties plaintiff and defendant herein, it is hereby—

Ordered that the motion asking for the discharge and dismissal of said receiver heretofore appointed under order of this court be and the same is hereby dismissed, the appointment of said receiver being hereby confirmed, and that the receivership be continued until the further order of this court.

Dated August 10th, 1900.

ARTHUR H. NOYES, *Judge.*

(Endorsed:) Filed in the United States district court, district of Alaska, second division, August 10, 1900. Geo. V. Borchsenius, clerk. F. T. Merritt, deputy.

By which first-named order said complainants were awarded a preliminary injunction against said respondent and a receiver was appointed to take charge of the property of respondent, and by

which second-named order the said court denied respondent's motion to vacate and set aside said first-named order, judgment, and decree, and respondent herein hereby petitions said court for an order allowing him to prosecute an appeal from said orders, judgments, and decrees, and from each and every part thereof, to the honorable, the United States circuit court of appeals for the ninth circuit under and in accordance with the laws of the United States in that behalf made and provided; also, that an order be made fixing the amount of security which respondent shall give and furnish upon such appeal, and that upon the giving of said security, proceedings in said district court of Alaska be suspended and stayed until the determination of said appeal by the said United States circuit court of appeals for the ninth circuit, and that a writ of supersedeas issue to said complainants, their agents, and servants, under the seal of this court, and your petitioner will ever pray, etc.

Dated August 29th, 1900.

CHAS. PAGE,
EDW'D J. McCUTCHEN,
SAM'L KNIGHT,
Solicitors for Respondent.

(Endorsed:) Filed Aug. 29, 1900. F. D. Monckton, clerk.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing to be a full, true, and correct copy of a "petition for order allowing appeal," etc. filed in the cause entitled John I. Tornanses, appellant, *vs.* L. F. Melsing *et al.*, No. 634, as the original thereof remains of record in my office.

Attest my hand and seal of said circuit court of appeals this 30th day of August, A. D. 1900.

[SEAL.] F. D. MONCKTON, *Clerk.*

[10-cent rev. stamp, canceled.]

(Endorsed:) No. 5. No. 634. United States circuit court of appeals in and for the ninth circuit. L. F. Melsing *et al.*, complainants, *vs.* John I. Tornanses, defendant and respondent. Petition for order allowing appeal. Filed in the United States district court, district of Alaska, second division, September 14, 1900. Geo. V. Borchsenius, clerk. John T. Reed, deputy. Copy. Page, McCutchen, Harding & Knight, attorneys for respondent.

COPY BOUND CLOSE IN CENTER

In the United States Circuit Court of Appeals for the Ninth Circuit.

L. F. MELSING, H. L. BLAKE, D. B. LIBBY, W. T. HUME, and O. P. Hubbard, Complainants,

vs.

JOHN I. TORNANSES, Defendant and Appellant.

Assignment of Errors.

John I. Tornanses, defendant and appellant above named, having appealed, or being about to appeal, from that certain interlocutory order, judgment and decree made in the district court of the United States in and for the district of Alaska, second division, on the 23d day of July, 1900, in an action pending in said court, in which L. F. Melsing, H. L. Blake, D. B. Libby, W. T. Hume, and O. P. Hubbard above named were plaintiffs, and the said John I. Tornanses was defendant, which said order was filed in said court on the 8th day of August, 1900, and also from that certain order made and entered in the said court and in the said cause on the 10th day of August, 1900, by which said first-named order said plaintiffs were awarded a preliminary injunction against said defendant, and a receiver was appointed to take charge of the property of defendant; and by which said second-named order defendant's motion to vacate and set aside said first-named order was denied: says that in the record and proceedings in the said court, in the said action, there are manifest errors, and assigns the following as such errors, and presents and files the following as his assignment of errors upon the said appeal:

I.

The said district court and the judge thereof erred in making the said interlocutory order of the 23d day of July, 1900, granting an injunction and appointing a receiver.

II.

The said district court and the judge thereof erred in making said order of August 10th, 1900, refusing to vacate and set aside the first-named order.

III.

The said district court and the judge thereof erred in making the said order of July 23d, 1900, in this; that the said court had not, nor had the said judge thereof, any jurisdiction to make the said order.

IV.

The said district court and the judge thereof erred in making said order of July 23d, 1900, in that the said order was made without notice to defendant.

V.

The said district court and the judge thereof erred in making said order of July 23d, 1900, in that the said court abused its discretion and permitted an abuse of its discretion in making said order.

VI.

The said district court and the judge thereof erred in making said order of August 10th, 1900, in that the said court abused its discretion and permitted an abuse of its discretion in making said order.

VII.

The said district court and the judge thereof erred in making said order of July 23d, 1900, in that there was no evidence presented to the said court at the said time sufficient to support the said order.

VIII.

The said district court and the judge thereof erred in making said order of August 10th, 1900, in that there was no evidence presented to the said court at the said time sufficient to support the said order.

IX.

The said district court and the judge thereof erred in making said order of July 23d, 1900, enjoining said defendant from interfering with the control by the said receiver of the property involved in the said action, or with the management thereof, without requiring any bond or undertaking from plaintiffs therefor.

X.

The said district court and the judge thereof erred in making said order of July 23d, 1900, appointing a receiver and restraining defendant from interfering with the management or control of said property without affording defendant due process of law.

XI.

The said district court and the judge thereof erred in requiring of said receiver a bond or undertaking in the amount of five thousand dollars only.

XII.

The said district court and the judge thereof erred in permitting an abuse of discretion in making said order appointing a receiver upon the filing within the time there designated of a bond or undertaking for five thousand dollars only.

XIII.

The said district court and the judge thereof erred in making the order of August 10th, 1900, and in refusing to set aside the prior order of July 23d, 1900, in that the said prior order was made and signed *ex parte* and without any notice to the defendant.

XIV.

The said district court and the judge thereof erred in making the said order of August 10th, 1900, and in refusing to set aside the prior order of July 23d, 1900, in that the said prior order was made and signed without requiring any bond or undertaking from the plaintiffs therefor, and no bond or undertaking therefor was subsequently given by the plaintiffs.

XV.

The said district court and the judge thereof erred in making said order of August 10th, 1900, and in refusing to set aside said prior order of July 23d, 1900, in that, on the hearing prior to the making of the order of August 10th, 1900, the equities of plaintiffs' complaint and affidavit were fully denied by the affidavit filed by the defendant.

XVI.

The said district court and the judge thereof erred in making said order of July 23d, 1900, in that the complaint of plaintiffs in said action did not show facts justifying the appointment of a receiver or the granting of an injunction, nor were sufficient facts shown by the proofs adduced by the plaintiffs.

XVII.

The said district court and the judge thereof erred in making said order of July 23d, 1900, in that neither the complaint of plaintiffs nor the affidavits filed in the said action on behalf of plaintiffs stated any facts entitling the plaintiffs to any equitable relief whatever.

XVIII.

The said district court and the judge thereof erred in authorizing and directing the receiver to take possession of the property mentioned in said order.

XIX.

The said district court and the judge thereof erred in making said order of July 23d, 1900, and in refusing to set aside the said order in this: that it is shown by the record in the said action that the defendant was in the quiet and peaceable possession of the property affected by the said action, and had been in such quiet and peace-

able possession for more than one year next preceding the commencement of the said action, under a claim of title by and through the laws of the United States.

In order that the foregoing assignment of errors may be and appear of record, the appellant above named presents the same to the court, and prays that such disposition may be made thereof as by the law and the statutes of the United States in such cases is made and provided.

PAGE, McCUTCHEN, HARDING & KNIGHT, *Attorneys for Appellant.*

(Endorsed:) Filed Aug. 29, 1900. F. D. Monckton, clerk.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing to be a full, true, and correct copy of an assignment of errors filed in the cause entitled John I. Tornanses, appellant, *vs.* L. F. Melsing *et al.*, No. 634, as the original thereof remains of record in my office.

Attest my hand and seal of said circuit court of appeals this 30th day of August, A. D. 1900.

[SEAL.] F. D. MONCKTON, *Clerk.*

(Ten-cent revenue stamp, canceled.)

(Endorsed:) No. 5. No. 634. United States circuit court of appeals for the ninth circuit. L. F. Melsing *et al.*, complainants, *vs.* John I. Tornanses, defendant and appel-ants. Assignment of errors. Copy. Filed in the United States district court, district of Alaska, second division, September 14, 1900. Geo. V. Borchsenius, clerk. John T. Reed, deputy. Page, McCutchen, Harding & Knight, attorneys for appellant.

In the United States Circuit Court of Appeals in and for the Ninth Circuit.

L. F. MELSING, H. L. BLAKE, D. B. LIBBY, W. T. HUME, and O. P. Hubbard, Complainants,
vs.
JOHN I. TORNANSES, Defendant and Respondent.

Order Allowing Appeal and Fixing Bond.

On motion of Messrs. Charles Page and Edward J. McCutchen, counsel for respondent, and on filing the petition of John I. Tornanses for an order allowing an appeal, together with an assignment of errors, it is ordered that an appeal be and is hereby allowed to the United States circuit court of appeals for the ninth circuit from the interlocutory order, judgment and decree given and rendered herein on the 23d day of July, 1900, in the district court of

the district of Alaska, second division, and filed in said court on the 8th day of August, 1900, granting an injunction *pendente lite* against respondent herein and appointing a receiver to take charge of the property of respondent, and also from the order made and entered herein on the 10th day of August, 1900, in said court denying respondent's motion to vacate and set aside said first-named order, judgment and decree.

That the amount of the bond upon said appeal be and is hereby fixed at the sum of $20,000;

That upon the execution and approval of said bond by this court a writ of supersedeas issue under the seal of this court directed to complainants herein, their agents and servants, and the receiver appointed herein under said first-named order that they desist and refrain from in any manner interfering with said property, or in any manner enforcing or attempting to enforce said order of July 23d, 1900, filed as aforesaid on the 8th day of August, 1900, until said appeal be heard and determined, or the further order of this court.

That a certified transcript of the record and proceedings herein be forthwith transmitted to the said United States circuit court of appeals.

Dated August 29, 1900.

WM. W. MORROW, *Judge.*

(Endorsed:) Filed Aug. 29, 1900. F. D. Monckton, clerk.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing to be a full, true and correct copy of an "order" filed in the cause entitled John I. Tornanses, appellant, *vs.* L. F. Melsing *et al.*, appellees, No. 634, as the original thereof remains of record in my office.

Attest my hand and seal of said circuit court of appeals this 30th day of August, A. D. 1900.

[SEAL.] F. D. MONCKTON, *Clerk.*

(Ten-cent revenue stamp, canceled.)

(Endorsed:) No. 5. No. 634. United States circuit court of appeals in and for the ninth circuit. L. F. Melsing *et al.*, complainants, *vs.* John I. Tornanses, defendant and respondent. Order. Copy. Filed in the United States district court, district of Alaska, second division, September 14, 1900. Geo. V. Borchsenius, clerk. John T. Reed, deputy. Page, McCutchen, Harding & Knight, attorneys for respondent.

Citation (Copy).

UNITED STATES OF AMERICA, *ss:*

The President of the United States to L. F. Melsing, H. L. Blake, D. B. Libby, W. T. Hume, and O. P. Hubbard, Greeting:

You are hereby cited and admonished to be and appear at a United States circuit court of appeals for the ninth circuit, to be holden at the city of San Francisco, in the State of California, on the 28th day of September, 1900, pursuant to an order allowing an appeal duly entered and of record in the clerk's office of the said United States circuit court of appeals for the ninth circuit, wherein one John I. Tornanses is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable W. W. Morrow, judge of the United States circuit court of appeals for the ninth judicial circuit, at the city and county of San Francisco, State of California, this 29th day of August, A. D. 1900.

WM. W. MORROW,
United States Circuit Judge for the Ninth Judicial Circuit.

(Endorsed:) 5. United States circuit court of appeals for the ninth circuit. John I. Tornanses, appellant, *vs.* L. F. Melsing *et al.*, appellees. Citation. Filed in the United States district court, district of Alaska, second division, September 14, 1900. Geo. V. Borchsenius, clerk. John T. Reed, deputy.

In the United States Circuit Court of Appeals for the Ninth Circuit.

L. F. MELSING, H. L. BLAKE, D. B. LIBBY, W. T. HUME, and O. P. Hubbard, Complainants,
vs.
JOHN I. TORNANSES, Defendant and Appellant.

Writ of Supersedeas.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Arthur H. Noyes, judge of the district court for the district of Alaska, second division, and to L. F. Melsing, H. L. Blake, D. B. Libby, W. T. Hume, O. P. Hubbard, and Alexander McKenzie, Greeting:

Whereas, in the above-entitled cause appellant has petitioned this court for an order allowing an appeal to this court from an interlocutory order, judgment and decree given and rendered herein on

the 23d day of July, 1900, by the district court for the district of Alaska, second division, granting unto complainants herein an injunction ordering and directing the defendant and appellant to cease from working a certain mining claim in said bill of complaint mentioned called No. 10 Above Discovery, on Anvil creek, situated within said district of Alaska, and also ordering and directing said defendant to turn the possession of said mine unto the said Alexander McKenzie, as receiver thereof, and also ordering and directing said receiver to take possession of said mine and mining property and to conduct and work the same as receiver thereof, together with such other and various things as are in said order provided, and also allowing an appeal from the order made and entered by said court in said action on the 10th day of August, 1900, by which said court denied appellant's motion to vacate and set aside said first-named order, judgment and decree, and has also in said petition prayed for a writ of supersedeas, and said appeal having been by said circuit court of appeals allowed and said petition for a writ of supersedeas granted upon the appellant's filing a bond in the sum of $20,000 to be approved by this court, and said bond in the sum of $20,000 with approved sureties having been filed and approved by this court:

Now, therefore, you the said L. F. Melsing, H. L. Blake, D. B. Libby, W. T. Hume, O. P. Hubbard, Alexander McKenzie, and Arthur H. Noyes, judge of said district court for the district of Alaska, second division, and each of you are hereby commanded that from every and all proceedings on any execution of the aforesaid order, or in anywise molesting said defendant and appellant on the account aforesaid, or in any manner interfering with his possession of said property, you entirely surcease and refrain as being superseded, and that you, the said Alexander McKenzie, do forthwith return unto said defendant the possession of any and all property of which you took possession under and by virtue of said order, and that you do make return of this supersedeas together with your acts and doings thereon to said district court for the district of Alaska, second division, as you will answer the contrary at your peril, and you, the judge of said district court for the district of Alaska, second division, are hereby commanded to stay any and all proceedings which may have issued as aforesaid upon said order, and to stay any and all further proceedings in relation to said order and the appointment of a receiver thereunder in this case pending the appeal last aforesaid to this court.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States this 29th day of August, in the year of our Lord one thousand nine hundred.

[SEAL.] F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

(Endorsed:) No. 5. No. 643. United States circuit court of appeals for the ninth circuit. L. F. Melsing *et al.*, complainants, v

John I. Tornanses, defendant and appellant. Supersedeas. Filed in the United States district court, district of Alaska, second division, September 14, 1900. Geo. V. Borchsenius, clerk. John T. Reed, deputy. Page, McCutchen, Harding & Knight, attorneys for appellant.

Supersedeas Bond.

Know all men by these presents that we, John I. Tornanses, as principal, and Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto L. F. Melsing, H. L. Blake, D. B. Libby, W. T. Hume and O. P. Hubbard in the full and just sum of $20,000, to be paid to the said L. F. Melsing, H. L. Blake, D. B. Libby, W. T. Hume and O. P. Hubbard, their certain attorneys, executors, administrators, or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally firmly by these presents.

In witness whereof, we have executed these presents this 29th day of August, 1900.

Whereas, lately, at a district court, for the district of Alaska, second division, in a suit then pending in the said district court, between L. F. Melsing, H. D. Blake, D. B. Libby, W. T. Hume and O. P. Hubbard, as plaintiffs, and John I. Tornanses, as defendant, a certain interlocutory order or decree dated July 23d, 1900, and filed in said court August 8th, 1900, and a certain other order and decree dated August 10th, 1900, were made and rendered against the said John I. Tornanses, and

Whereas the said John I. Tornanses has obtained from the United States circuit court of appeals for the ninth circuit an order allowing an appeal from each of the said orders and granting a writ of supersedeas to reverse and set aside the said orders and decrees, and

Whereas a citation dated August 29th, 1900, directed to the said L. F. Melsing, H. L. Blake, D. B. Libby, W. T. Hume and O. P. Hubbard, plaintiffs, above named, has issued citing and admonishing them to be and appear at a United States circuit court of appeals for the ninth circuit, to be holden at San Francisco in the State of California within thirty days from the date thereof:

Now, the condition of the above obligation is such that if the said John I. Tornanses shall prosecute his said appeals to effect, and shall answer all damages and costs if he fails to make his pleas good in the above-entitled cause, in the said United States circuit court of appeals, then the above obligation to be void, otherwise to remain in full force and virtue.

JOHN I. TORNANSES,
By PAGE, McCUTCHEN, HARDING & KNIGHT, *His Attorneys.*
FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By C. H. WILSON, *Its Attorney-in-fact.* [SEAL.]
Attest: FRANK L. GILBERT,
Its General Agent.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing, with endorsements on annexed cover to be a full, true and correct copy of a "bond" filed in the cause entitled John I. Tornanses, appellant, vs. L. F. Melsing *et al.*, appellees, No. 634, as the original thereof remains of record in my office.

Attest my hand and seal of said circuit court of appeals this 30th day of August, A. D. 1900.

[SEAL.] F. D. MONCKTON, *Clerk.*

[10-cent. rev. stamp, canceled.]

The within bond is hereby approved this 29th day of August, 1900.

WM. W. MORROW, *Judge.*

(Endorsed:) No. 5. No. 634. United States circuit court of appeals for the ninth circuit. L. F. Melsing, H. L. Blake, D. B. Libby, W. T. Hume, and O. P. Hubbard, complainants, *vs.* John I. Tornanses, defendant and appellant. Supersedeas bond.

(Endorsed:) Filed August 29, 1900. F. D. Monckton, clerk. Filed in the United States district court, district of Alaska, second division. Copy. September 15, 1900. Geo. V. Borschsenius, clerk. John T. Reed, deputy. Page, McCutchen, Harding & Knight, attorneys for —— ——.

Exhibit D.

In the United States Circuit Court of Appeals for the Ninth Circuit.

William A. Kjellman, Appellant, *vs.* Henry Rogers et al. John I. Tornanses, Appellant, *vs.* L. F. Melsing et al.	Nos. 636 and 634.

In the matter of the alleged contempt of Alexander McKenzie in having, it is said, disobeyed and refused to comply with the terms of the writs of supersedeas duly issued herein.

Plea.

In the United States Circuit Court of Appeals in and for the Ninth Circuit.

John I. Tornanses et al., Appellants,
vs.
L. F. Melsing et al., Appellees.

In the matter of Alexander McKenzie for contempt.

Now comes the above-named defendant, Alexander McKenzie, specially appearing under protest for the purposes of this plea and for no other, and says:

That this court is without jurisdiction of the above-entitled cause or to arrest, try, or punish this defendant as for contempt of this court for disobeying that certain document entitled a writ of supersedeas, issued by the clerk of the circuit court of appeals for the ninth circuit, on said date, on the order of Hon. W. W. Morrow, United States circuit judge for the ninth circuit, for the following reasons, to wit:

I.

That the affidavits filed herein, on motion for the attachment of this defendant for contempt of this court, do not state facts sufficient to show that this honorable court had on the first day of October, 1900, or at any time, jurisdiction of the above-entitled cause or of any order or proceeding relating to or concerning or included in said action made or entered therein by the district court in and for Alaska, second division.

II.

That this honorable court did not authorize or direct the issuance of the document entitled a writ of supersedeas, which it is claimed

this defendant disobeyed and which was issued by the clerk of this court on the 27th day of August, 1900, and that the same was issued by said clerk without authority of law and was and is void.

III.

That on the said 27th day of August, 1900, this court was without authority of law to issue said writ of supersedeas so called, or order the said writ to issue, for that it did not have jurisdiction of the action of John I. Tornanses *et al. vs.* L. F. Melsing *et al.*, as at that time no appeal had been taken to this court in said case of Tornanses vs. Melsing or from any order made or entered in said cause by the district court of Alaska, second division, because:

(*a.*) On said 27th day of August no appeal had been taken in said cause from the district court of Alaska to this honorable court, for on said date neither the order allowing the appeal nor an assignment of errors nor undertaking on appeal had been filed with the clerk of the district court for the district of Alaska, second division, and no appeal had been allowed by said court or the judge thereof.

(*b.*) That on the first day of October, when the warrant herein was issued, this court was entirely without jurisdiction in the above-entitled cause, for that on said date neither the order allowing the appeal nor any assignment of errors nor undertaking on appeal had been filed with the clerk of the district court for the district of Alaska, second division, and further that on said date the above-entitled cause had not been docketed in this honorable court nor the record in said cause filed herein and the return day of the appeal as designated in the order allowing the appeal herein and the citation signed by Hon. W. W. Morrow, the judge allowing said appeal, had passed.

(*c.*) That this court is now without jurisdiction in the action of Tornanses *vs.* Melsing *et al.*, or of any order made therein, for that no appeal to this honorable court from the district court of Alaska has ever been taken in the above-entitled action or from any order made therein by said district court of Alaska, and that neither the order allowing an appeal signed by the Hon. W. W. Morrow on the 27th of August nor any assignment of errors in said matter nor any undertaking upon appeal has at any time been lodged or filed with the clerk of the said district court of the district of Alaska, and said appeal was not docketed or the record in said cause filed herein in this court within thirty days after making such order, and the time for docketing said cause and filing said record had not been extended before the expiration of said thirty days.

IV.

That the paper entitled a writ of supersedeas was issued by the clerk of this court on the order of the Hon. W. W. Morrow, circuit judge for the ninth circuit, and as such judge and not otherwise.

That said Hon. W. W. Morrow, circuit judge, as aforesaid, was

without authority of law to order the issuance of such writ, for that the same could only be issued, if at all, by this honorable court, acting as a court, and power to issue the same was not vested in the individual judges thereof; therefore said order of W. W. Morrow, circuit judge, as aforesaid, and the said writ issued in obedience to his said order was and is void.

Defendant alleges that on the dates when it is alleged in the affidavits upon which the warrant for the arrest of this defendant was issued this defendant failed to obey said writ of supersedeas the said writ of supersedeas was inoperative and void for that no appeal had been taken to this court in the above-entitled cause.

V.

This honorable court and the judges thereof were without authority to issue or direct the issuance of the writ of supersedeas involved in this case, inasmuch as said writ went beyond the proper scope of such a writ and nullified the order of the lower court instead of directing a mere stay of proceedings.

VI.

A judge of the circuit court of appeals for the ninth circuit had no power to grant the supersedeas staying the proceedings in the court below herein, for the reason that such power was vested exclusively in the district court of Alaska.

VII.

This court was and is without jurisdiction in the premises:

(*a*.) Because there is no provision of law authorizing an appeal from an interlocutory order of the district court of Alaska appointing a receiver or from an order refusing to discharge a receiver.

(*b*.) Because the order in question made by the district court of Alaska is an interlocutory order appointing a receiver and not an interlocutory order granting an injunction or refusing to dissolve an injunction.

Wherefore this defendant asks that the warrant herein be set aside and he be discharged.

T. J. GEARY,
C. A. SEVERANCE,
Solicitors for Defendant McKenzie.

[Endorsed:] In the United States circuit court of appeals for the ninth circuit. John I. Tornanses *et al. vs.* L. F. Melsing *et al.* Plea.

In the United States Circuit Court of Appeals in and for the Ninth Circuit.

WILLIAM A. KJELLMAN ET AL., Appellants,
vs.
HENRY ROGERS, Appellee.

In the Matter of ALEXANDER McKENZIE for Contempt.

Answer of Alexander McKenzie.

Now comes Alexander McKenzie, defendant herein, and saving and reserving all objections heretofore made in his plea to the jurisdiction of this court, and excepting to the overruling thereof and answering under protest the order to show cause why he should not be punished for contempt heretofore made herein by this honorable court, respectfully alleges:

That on the 23d day of July, 1900, he was, by the district court of Alaska, second division, duly and regularly appointed receiver in the above-entitled cause, and thereafter duly qualified and entered upon the performance of his duties as such receiver, and that said order appointing him receiver has never been revoked.

That immediately after the making of such order he entered into possession of the mining property described in the pleadings in the above-entitled action, and proceeded to mine and operate such properties under the directions and orders of the district court of the district court of Alaska and of the judge thereof and extracted from said property — gold and gold dust and which came to his possession as such receiver.

That on the 20th day of August, 1900, the said district court, by an order duly and regularly made, directed this defendant to deposit all such gold and gold dust so held and received by him as receiver in the vault of the Alaska Banking and Safe Deposit Company in the town of Nome, Alaska, until the further order of said court, and that he obeyed such order until the 15th day of September, 1900, when he was prevented from further obeying it as herein after stated.

That on the 14th day of September, 1900, all of the gold and gold dust received by him as receiver on the properties described in the pleadings herein was deposited in the said vault of the Alaska Banking and Safe Deposit Company in obedience to the orders of the said district court of Alaska, except such portions as had been withdrawn by order of said court.

That on the 15th day of September, Arthur H. Noyes, judge of said district court of Alaska, ordered and directed the United States marshal for the district of Alaska, second division, to take possession of the portions of said vault containing the gold and gold dust held by this defendant as receiver, place a guard over it, and not to permit this defendant access to said vault.

That the said C. L. Vawter, marshal as aforesid, in obedience to the orders of said Arthur H. Noyes, judge as aforesaid, immediately took possession of said vault and placed a military guard in charge thereof with instructions to enforce the orders of said district judge and not to permit this defendant to have access to said vault or to the boxes thereof containing the gold dust received by him as such receiver.

That from and after said 15th day of September, 1900, this deponent never was permitted to have access to the boxes in said vault containing the gold and gold dust deposited by him as such receiver, and he was not permitted to exercise any control whatever over the same.

That on said date and thereafter this defendant was without the ability to comply with the order of this court.

Defendant admits that the demand for the immediate delivery of the property described in the pleadings herein and the gold and gold dust the proceeds thereof was made on him on the 14th day of September in the manner and form set forth in the affidavit of Samuel Knight heretofore filed herein.

That said defendant is not learned in the law, and desired to be made acquainted with his rights and duties in the premises on such date by his counsel and immediately submitted the matters to his counsel, asking for his opinion as to the law applicable in the premises.

That before receiving such advice the Hon. Arthur H. Noyes, judge of the district court of Alaska, had made and issued the order to the United States marshal hereinbefore set forth, and thereafter it was not in the power of this defendant to comply with the order of this court, and the said order to said marshal was made without the knowledge, consent or solicitation of this defendant, and further, that this defendant was advised that between the 15th and 19th days of September, 1900, applications were made to the Hon. Arthur H. Noyes, judge of the district court of Alaska, and to said district court by the defendants in the above-entitled action requesting said Arthur H. Noyes, judge as aforesaid, and the said district court to order and direct this defendant to surrender to the defendants herein the gold and gold dust then in his possession the proceeds of the property described in the pleadings herein, and the said Arthur H. Noyes did, on said dates fail, refuse and decline to make such orders so requested by appellants.

That said gold and gold dust, the proceeds of said properties aforesaid and contained in the vault of the Alaska Banking and Safe Deposit Company, has not been under the possession of, or under the control of this defendant since the 14th day of September, 1900.

That on said 15th day of September, 1900, this defendant as such receiver ceased all work upon the property described in the pleadings herein, discharged all the laborers employed thereon and ceased to operate or mine such properties, and the appellants herein on the

said 15th day of September took possession of said properties, and have ever since remained in possession thereof and undisturbed by this defendant.

That on the 14th day of September, 1900, this deponent was engaged in operating the mining property described in the pleadings herein, and was then employing about fifty-five men as miners on such claims.

That there was then due and owing for labor and supplies furnished on account of said property and necessarily incurred in extracting the gold and gold dust from such claim, which has come to the hands of this receiver, about $4,400.00.

That this receiver had previously expended for the same purpose in addition thereto about $7,000.00.

That on said 14th day of September, 1900, deponent was engaged in having an account of his operations of such properties as receiver prepared for filing and settlement in said district court of Alaska.

That appellants herein had some days prior thereto obtained from said district court of Alaska an order requiring him to forthwith file his accounts as said receiver.

That said accounts had not been completed on the 14th day of September, 1900, and this defendant did not know the balance in his hands as such receiver on account of the property described herein.

That no other or further demand was made on him to comply with the writ in this case than as hereinbefore set forth.

That on the said 15th day of September, 1900, said C. L. Vawter, marshal of the district court of Alaska, as aforesaid, in obedience to the orders of said Arthur H. Noyes, judge as aforesaid, immediately took possession of the said vault and placed a military guard in charge thereof with instructions to enforce the order of the said district judge, and not to permit this defendant to have access to such vault or the boxes contained therein.

That the accounts of this receiver have never been settled or allowed.

That since the 14th day of September, 1900, this defendant has not been permitted to have access to the gold and gold dust received by him as such receiver herein.

That about the 15th day of September, by agreement between the parties to the above-entitled cause, and the other Anvil Creek cases, this defendant was authorized and directed to issue his check as such receiver in payment of the wages of the laborers employed by him, it being further agreed and understood that after all such labor had been so paid the parties hereto would obtain from the district court of Alaska, or the judge thereof, the necessary order authorizing the withdrawal from said safe-deposit vaults of sufficient of the gold and gold dust therein contained to pay such checks.

That on the 10th day of October, 1900, and after all such labor had been paid amounting to about the sum of seventeen thousand dollars, the parties in the action entitled Kjellmann *vs.* Rogers did

procure by stipulation from said judge as aforesaid an order directing this defendant to withdraw from said vault sufficient dust to pay said claim.

That in pursuance of said order this defendant presented himself at the entrance to the vault wherein such dust was contained and asked to be permitted access to the said boxes.

That the manager of the said Bank and Safe Deposit Company, Dr. C. Whitehead, and the guard in charge thereof refused to permit this defendant to enter said vault, stating at the time that they had received orders from the marshal not to permit him to so enter.

That this defendant was then compelled to procure a copy of such order and serve it upon the United States marshal before he was permitted to enter said vault. That the manner in which he then entered was as follows:

That in company with Dr. Whitehead he proceeded to the box containing the said dust belonging to the properties described therein, and he and Dr. Whitehead weighed out sufficient dust from the same to pay the checks previously issued by him in payment of wages. Immediately thereafter the boxes containing the remainder of such dust were again closed and returned by Dr. Whitehead to the boxes of the vault, and which boxes were immediately closed and this defendant withdrew from the vault.

That between the 15th day of September and the present date this was the only occasion when this defendant was permitted to have access to said vault.

That it was never the intention of this defendant to exhibit or be guilty of any contempt of this honorable court or to disobey any of its lawful orders or writs.

Denies that on the 14th day of September, 1900, this defendant attempted to have access to the vault *when* the gold dust received by him as receiver was contained.

Wherefore, he prays that the order heretofore issued herein be quashed and he be discharged.

T. J. GEARY,
C. A. SEVERANCE,
Solicitors for Defendant McKenzie.

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss:

Alexander McKenzie, being duly sworn, deposes and says that he has read the foregoing answer and knows the contents thereof, and the same is true of his own knowledge except as to the matters therein stated on his information and belief and as to those matters, he believes it to be true.

ALEX. McKENZIE.

Subscribed and sworn to before me this 16th day of January, 1901.

[SEAL.] F. D. MONCKTON.
Clerk United States Circuit Court of Appeals for the Ninth Circuit.

(Endorsed:) No. 636. In the United States circuit court of appeals for the ninth circuit. William A. Kjellmann *et al. vs.* Henry Rogers. Answer of Alex. McKenzie. Filed January 16, 1901. F. D. Monckton, clerk.

Affidavit of C. L. Vawter.

UNITED STATES OF AMERICA, }
Second Division, District of Alaska. }

C. L. Vawter, being duly sworn, deposes and says that he is the United States marshal for the second division for the district of Alaska, duly appointed and qualified and acting as such.

That on the 15th day of September, 1900, Judge Arthur H. Noyes, United States district judge for the district of Alaska, second division, ordered this affiant, as such marshal, to repair to the building occupied by the Alaska Banking and Safe Deposit Company, in which the gold and gold dust held by Alexander McKenzie, as receiver of sundry claims in Alaska, was deposited, and to place a guard over such vaults, and not to permit any persons, especially the said Alexander McKenzie, and the parties interested, to have access to the boxes in which the gold and gold dust so held by said said receiver was so contained, until a further order of the court; and not to permit any person, especially the said Alexander McKenzie and the parties in interest, to open said boxes, or to withdraw any portion of the gold or gold dust contained therein, until the said order of the said court.

That in pursuance of the aforesaid order he repaired to said bank and placed a guard of United States soldiers over said vault. That such guard continued without interruption, day and night, until the 16th day of October, 1900.

That said guard of soldiers was instructed by him as said marshal not to permit said Alexander McKenzie, or any other interested person, to enter said safety boxes, or to have access thereto.

That he informed said Alexander McKenzie of said order of said Arthur H. Noyes, district judge, as aforesaid; that he would not permit said Alexander McKenzie to enter said vault, or have access thereto without first securing an order from said judge.

That on the 13th day of October, 1900, said Alexander McKenzie did request of this affiant that he be permitted to enter said vault, to open one of the boxes containing the gold and gold dust taken from certain of said claims for the purpose of withdrawing therefrom a quantity of said gold dust for the purpose of paying claims

against such mining property, as provided in a certain stipulation that day accepted by attorneys for plaintiffs and defendants.

That this affiant informed said Alexander McKenzie that he would have to obtain an order from said judge so permitting him to enter said boxes for the purpose of procuring said money.

That in the absence of said order this affiant would not permit him to enter said vault.

That thereafter on same day, after the gold had been withdrawn under the stipulation and order of the court above referred to, this affiant went to said Judge Arthur H. Noyes for further instructions, and said Judge Arthur H. Noyes then and there instructed this affiant to let the previous order continue and not permit Receiver Alexander McKenzie, or any other person or persons, to have access to said gold or withdraw any of same until further order of the court.

C. L. VAWTER.

Subscribed and sworn to before me this 18th day of October, 1900.

[SEAL.] GEO. A. LEEKLEY,
Notary Public in and for the District of Alaska.

(Endorsed:) No. 636. United States circuit court of appeals for the ninth circuit. William A. Kjellman *vs.* Henry Rogers. Affidavit of C. L. Vawter. Filed January 16, 1901. F. D. Monckton, clerk.

Affidavit of Dr. Cabell Whitehead.

DISTRICT OF COLUMBIA, *Washington, D. C.*, } *ss:*

Dr. Cabell Whitehead, being first duly sworn, on oath deposes and says:

I was the manager of the Alaska Banking and Safe Deposit Company, in the city of Nome, district of Alaska, and had exclusive charge of the bank and safe-deposit vaults of that company from the 1st day of July until the 20th day of October, 1900.

Besides doing a general banking business the bank was equipped with safe-deposit boxes which were rented by the month to different persons for the storage and safe keeping of gold, gold dust and other valuables.

About the 14th day of August, 1900, Alexander McKenzie who had been appointed receiver of certain mining claims on Anvil creek in the Cape Nome mining district, district of Alaska, engaged from this affiant eight safety-deposit boxes in the said Alaska Banking and Safe Deposit Company and deposited in the said boxes gold dust and gold said to be taken from the said claims, pursuant to an order of the district court of the second division of the district of Alaska, made on or about said date so directing said McKenzie to deposit said gold.

Affiant further states that on the 15th day of September, 1900, he was notified by C. L. Vawter, United States marshal for said district, that the said McKenzie was not to be permitted to have access to the vault or boxes therein in which the said gold dust had been deposited without an order of the court, and that between the said 15th day of September and the 13th day of October, 1900, the said McKenzie had made no effort to enter said vault or to open the boxes therein containing the said gold and gold dust.

Affiant further states that on the 13th day of October, 1900, the said McKenzie applied to this affiant for permission to open the boxes so engaged by him in said vault for the purpose of withdrawing therefrom some of the gold dust so deposited by him in said boxes, which permission this affiant refused to grant and then and there notified McKenzie that he could not have access to the said boxes as this affiant has been ordered by the United States marshal not to permit such access. McKenzie at this time stated to this affiant that he desired to enter said boxes for the purpose of withdrawing from the boxes the gold dust taken from claim No. 10 Above and No. 2 Below on Anvil Creek and Discovery, or the necessary amount of the gold dust to pay certain claims for labor on said mining claims, which amount this affiant had previously advanced to the said McKenzie and which had been done under stipulation of all parties plaintiff and defendants to the suits.

Affiant further states that although McKenzie stated he wished to withdraw the gold dust from the said boxes for the sole purpose of paying this affiant the sums so advanced by him for the payment of labor claims on said mines, this affiant then and there insisted that McKenzie should get an order from the court and place it in the marshal's hands before he would allow him to enter the vaults or open the boxes therein containing the said gold dust. McKenzie then informed this affiant that he had an order, but affiant insisted that the order should be a specific one to the marshal or that he should decline to grant permission to enter the vaults.

Subsequently and on the same day I was served with a copy of the order and thereupon allowed McKenzie to enter the vaults.

Affiant further states that from and after the 15th day of September, 1900, and after he had been notified not to allow McKenzie to enter the vaults or open the boxes therein containing the gold dust, that the said McKenzie at no time attempted to enter said vaults or open the boxes therein, and that in the absence of a special order from the court allowing the same to be done this affiant would not have allowed McKenzie to enter the vaults or open the boxes, or remove any of the gold dust so deposited therein.

CABELL WHITEHEAD.

Subscribed and sworn to before me this 28th day of December, 1900, and I hereby certify that the erasures and interlineations in the foregoing affidavit were made before swearing to the same.

[SEAL.] JAS. N. FITZPATRICK,

Notary Public, District of Columbia, Washington, D. C.

All changes in above made by myself.

CABELL WHITEHEAD.

(Endorsed:) No. 636. United States circuit court of appeals for the ninth circuit. William A. Kjellman *vs.* Henry Rogers. Affidavit of Dr. Cabell Whitehead. Filed January 16, 1901. F. D. Monckton, clerk.

In the Circuit Court of Appeals for the Ninth Cercuit.

HENRY ROGERS, Plaintiff,
vs.
WILLIAM A. KJELLMAN ET AL., Defendants.

Affidavit of Charles H. Caton.

STATE OF WASHINGTON, *County of King,* } ss:

Charles H. Caton, being first duly sworn, on oath deposes and says:

That he was at Nome, Alaska, from about the 20th day of June, A. D. 1900, until about the 20th day of September, A. D. 1900; that on or about the 24th day of July, A. D. 1900, he took charge of what is known as claim No. Two Below Discovery on Anvil creek for the receiver, Alexander McKenzie; that affiant remained in charge of said claim for said receiver until on or about the 15th of September, A. D. 1900.

And affiant further says that on or about the said 15th of September, the foreman, C. McGown, received a communication from the receiver, Alexander McKenzie, by phone from Nome, ordering him to at once clean the boxes and lay off the men; that this order was obeyed promptly, the boxes were cleaned and taken out; that the day and night foremen both went to Nome that same evening, asking this affiant to occupy their tent in their absence, the said tent being used as an office.

And this affiant further says that the next morning while sitting in the tent in conversation with one Win Oler, three men entered, one of whom asked this affiant if he represented the receiver there; this affiant answered that he did, whereupon the party handed to this affiant a paper and asked him to read it; and affiant further says that before he had time to read the paper so handed him the party ordered this affiant to leave the claim; that this affiant stated to the said party that he was expecting orders from town shortly; that the party insisted that affiant must leave the claim at once; that affiant insisted that there was no necessity for such haste if they had proper authority; that thereupon the three parties addressed affiant in a very rough manner and with a threatening attitude and said that they would give this affiant just three minutes to get off

the claim; that if this affiant did not get off as ordered they would put him off.

Affiant further says that two of the parties who appeared on the said claim at the aforesaid time and ordered affiant to leave the claim as heretofore stated, gave their names as Price and the other party stated that he was a son of Charles D. Lane.

Affiant further says that not receiving further instructions from the receiver in town and not being able to reason with the parties above mentioned and not desiring to contend with three men who were apparently in liquor and evidently armed, affiant left the claim as demanded by them.

Affiant further says that he knows of his own personal knowledge that the receiver, Alexander McKenzie, ordered the work to cease upon said mining claim on the said 15th day of September, and that C. D. Lane and his associates began work on the said mining claim on the same day; that they engaged quite a number of men who were working on the claim under the receiver, Alexander McKenzie, and that these men continued to work for the said C. D. Lane on said mining claim until on or about the 20th of September, when this affiant left Nome for Seattle.

CHAS. H. CATON.

Subscribed and sworn to before me this 3d day of November, A. D. 1900.

[SEAL.] FRED. H. LYSONS,
Notary Public in and for the State of Washington,
Residing at Seattle, in said State.

(Endorsed:) No. 636. In the circuit court of appeals for the ninth circuit. Henry Rogers, plaintiff, *vs.* William A. Kjellman *et al.*, defendants. Affidavit of Charles H. Caton. Filed January 16, 1901. F. D. Monckton, clerk.

Affidavit of E. Gibson.

DISTRICT OF ALASKA, } ss:
Second Division, }

E. Gibson, being first duly sworn on oath deposes and says: That he has been in the employ of Alexander McKenzie, while the said McKenzie has been acting as receiver of the placer mining claim known as No. 2 Below Discovery on Anvil creek in the Cape Nome mining district, district of Alaska, in the capacity of foreman, and had as such foreman been in charge of the work on said mine.

Affiant further states that on the 15th day of September, 1900, he was notified by said McKenzie by telephone, to close down all work on said property, clean up the sluice boxes and with his men to come to Nome, as all further work on said property was to be discontinued, and that all further work was at that time discontinued.

the boxes cleaned up and the men discharged and withdrawn from said property.

Affiant further states that he was informed by said McKenzie by telephone, at the time he was notified to discontinue work on said property and to discharge the men and to come to Nome, that the order was made in compliance with an order of the court stopping all further work on said property.

Affiant further states that the defendants on the said 15th day of September, 1900, entered into and took possession of the said mine and property, and are, and have been, ever since that time, in possession of the same.

E. GIBSON.

Subscribed and sworn to before me this 18th day of October, 1900.

[SEAL.] HARRY Y. FREEDMAN,
Notary Public in and for the District of Alaska,
Residing at Nome.

(Endorsed:) No. 636. United States circuit court of appeals for the ninth circuit. William A. Kjellman *vs.* Henry Rogers. Affidavit of E. Gibson. Filed January 16, 1901. F. D. Monckton, clerk.

Affidavit of C. McGowan.

DISTRICT OF ALASKA, } ss:
Second Division, }

C. McGowan, being first duly sworn, on oath deposes and says: That he has been in the employ of Alexander McKenzie, while the said McKenzie has been acting as receiver of the placer mining claim known as No. 2 Below Discovery on Anvil creek, in the Cape Nome mining district, district of Alaska, in the capacity of foreman, and has as such foreman been in charge of the work on said mine.

Affiant further states that on the 15th day of September, 1900, he was notified by said McKenzie by telephone to close down all work on said property, clean up the sluice boxes and with his men to come to Nome as all further work on said property was to be discontinued, and that all further work was at that time discontinued, the boxes cleaned up and the men discharged and withdrawn from the said property.

Affiant further states that he was informed by said McKenzie, by telephone, at the time he was notified to discontinue work on said property and discharge the men and to come to Nome, that the order was made in compliance with an order of the court stopping all further work on said property.

Affiant further states that the defendants on the said 15th day of September, 1900, entered into and took possession of the said mine

and property, and are and have been ever since that time in po
sion of the same.

CARNILLE McGOWA

Subscribed and sworn to before me this 18th day of October, 1
[SEAL.] HARRY Y. FREEDMAN,
Notary Public in and for the District of Alaska,
Residing at Nom

(Endorsed :) No. 636. United States circuit court of appeals
the ninth circuit. William A. Kjellman *vs.* Henry Rogers.
davit of C. McGowan. Filed January 16, 1901. F. D. Monck
clerk.

Affidavit of George W. Comerford.

DISTRICT OF ALASKA, } ss :
Second Division, }

George W. Comerford, being first duly sworn, on oath deposes
says that he has been in the employ of Alexander McKenzie
since the said McKenzie has been acting as receiver of the A
Creek mining claims, in the Cape Nome mining district, distri
Alaska, in the capacity of general time-keeper and overseer of
work on said properties.

Affiant further states that on the 12th day of September, 1900
work was stopped on what is known as Discovery claim on
Anvil creek owing to high water, and that no work was done
said property after that date by the said McKenzie, or any pe
acting through or under him.

Affiant further states that on the evening of the 14th day of
tember, 1900, acting under orders of the said McKenzie, give
this affiant by telephone, he left the said property for Nome;
that before leaving said mine he informed the men that all fur
work on said property was at an end, and that they should com
Nome on the following day and receive their pay.

Affiant further states that the said McKenzie on the 15th da
September, 1900, also informed your affiant that he was actin
compliance with an order of the court, and that his order to
work was in compliance with the order of the court.

Affiant further states that all work was at that time stoppe
said property, and the men withdrawn therefrom and possessio
the property taken by defendants, and that the defendants h
ever since and do at the present time hold possession of said p
erty.

GEORGE W. COMERFOR

Subscribed and sworn to before me this 18th day of October, 1
[SEAL.] HARRY Y. FREEDMAN,
Notary Public in and for the District of Alaska,
Residing at Nom

(Endorsed:) No. 636. United States circuit court of appeals for the ninth circuit. William A. Kjellman *vs.* Henry Rogers. Affidavit of George W. Comerford. Filed January 16, 1901. F. D. Monckton, clerk.

Affidavit of F. R. Leonard.

DISTRICT OF ALASKA, } ss:
Second Division, }

F. R. Leonard, being first duly sworn, on oath deposes and says that he has been in the employ of Alexander McKenzie, while the said McKenzie has been acting as receiver of the placer mining claim known as No. 10 Above Discovery, on Anvil creek, in the Cape Nome mining district, district of Alaska, in the capacity of overseer, and has had general charge of the operations and work on said mine.

Affiant further states that on the 15th day of September, 1900, he was notified by said McKenzie by telephone to close down all work on said property, clean up the boxes and with his men to come to town, as all further work on said property was to be discontinued, and that all further work was at that time discontinued, the boxes cleaned up and the men discharged and withdrew from the mine.

Affiant further states that he was informed by said McKenzie at the time he was notified to discontinue work on said property and discharge the men and come to Nome that the order was made in compliance with an order of the court stopping all further work on said property.

F. R. LEONARD.

Subscribed and sworn to before me this 18th day of October, 1900.

[SEAL.] HARRY Y. FREEDMAN,
Notary Public in and for the District of Alaska,
Residing at Nome.

(Endorsed:) No. 636. United States circuit court of appeals for the ninth circuit. William A. Kjellman *vs.* Henry Rogers. Affidavit of F. R. Leonard. Filed January 16, 1901. F. D. Monckton, clerk.

In the Circuit Court of Appeals, Ninth Circuit.

WILLIAM A. KJELLMAN, Appellant, }
vs. }
HENRY ROGERS, Appellee. }

Affidavit of Cabell Whitehead (No. 2).

UNITED STATES OF AMERICA, } ss:
City of Washington, District of Columbia, }

Cabell Whitehead, being first duly sworn, deposes and says:

That he is a resident of the city of Washington, D. C., and during the summer of 1900 and at the various times hereinafter mentioned

was the manager of the Alaska Banking and Safe Deposit Company, a corporation conducting a banking business, having also safe-deposit boxes or vaults at Nome, Alaska, where he then resided.

That at different times in the months of July and August, commencing about the time of his arrival at Nome, one Alexander McKenzie rented from said company various safe-deposit boxes in which were shortly thereafter stored, under orders of the district court at Nome made subsequent thereto, large quantities of gold dust extracted, as affiant is credibly informed and therefore believes, principally, if not entirely, from certain placer mines on Anvil creek near Nome, by or under the direction of said McKenzie as receiver of said mines, known respectively as No. 2 Below Discovery and Nos. 2 and 10 Above, then involved with No. 1 Nakkela Gulch in litigation.

That from the various times it was so placed in said safe-deposit boxes as aforesaid, and up to the 14th day of September, 1900, said McKenzie and his agent had full and uncontrolled access to said gold and each and every part thereof, and to said boxes containing the same.

That on the day last mentioned serious disturbances having taken place in and about the building of said bank at Nome caused by said McKenzie's refusal to obey the provisions of certain writs of supersedeas of the above-entitled court issued in the litigation before mentioned, which said writs had immediately prior to the time last mentioned arrived at Nome, and, as affiant is informed and believes, been duly served upon said McKenzie and others at said time, and caused also by the determination of the defendants in said litigation, claiming said gold dust, that said writ should be obeyed and said dust restored to them, as therein provided, it was then and there agreed and understood by and between affiant, acting on behalf of said bank, said McKenzie as such receiver and Samuel Knight acting on behalf of the Wild Goose Mining and Trading Co.—impleaded by amended complaint, herein and in the further cases of Tornansis *vs.* Melsing *et al.*, and Nakkela *et al. vs.* Webster, also pending in the above-entitled court, and in which affiant swears to the same facts as are herein set forth—that no part of said gold dust extracted from the claims involved in said cases should be withdrawn from said safe-deposit boxes by said McKenzie except by the consent of said Knight.

That in pursuance of said agreement and understanding, in or about the early part of October, 1900, said McKenzie, with the consent of said Knight, withdrew from said safe-deposit boxes and handed affiant gold dust said to have been extracted from said claims amounting in value to a sum approximating $10,000 for the purpose of reimbursing said bank for the payment of checks which had been issued on said bank by said McKenzie and countersigned or vised by a representative of said Wild Goose Mining and Trading Co. for payment of the wages in full of all laboring men, including timekeepers, foremen, shift bosses, and watchmen employed in or

about said claims known as No. 2 Below, No. 10 Above. This amount was so used by said bank, except a small balance thereof, somewhat less than $1,000 in value, the money equivalent whereof, at $16 an ounce, being turned over to said Wild Goose Mining and Trading Co., when the officers of the court of appeals enforced its writs on the 15th day of October, 1900.

That at any or all times during the business hours of the day not only before but after the arrival at Nome and service of said writs of supersedeas, as aforesaid, and until their enforcement by the officers of the above-entitled court as aforesaid, said McKenzie was in a position to deliver and could have delivered, as far as affiant knows, to said Knight or to any one else acting on behalf of the said Wild Goose Mining and Trading Co. with the consent of said Knight all or any part of the gold dust stored in said safe-deposit boxes and extracted from said claims as aforesaid, to wit, from No. 2 Below and No. 10 Above, and therefore could have obeyed the directions in said writs of supersedeas contained; and although the United States marshal of the second division of the district of Alaska showed affiant about the 19th or 20th of September, 1900, a letter purporting to come from Judge Noyes directing the former to protect said gold dust, nevertheless neither the said marshal, nor any of his deputies, nor the commanding officer of the United States troops at Nome, nor any of his officers or soldiers ever at any time took or assumed any possession or control of or exercised any authority over said gold dust or any part thereof or took any part herein other or further than to preserve the general peace and order of the community, except that the military authorities, however, assisted the officers of said appellate court at their request in enforcing said writs of supersedeas when it was ascertained by them that neither the court at Nome nor its officers intended to nor did obey the direction of said appellate court.

Affiant further deposes that at all the times hereinbefore mentioned he and the officers of the said bank were ready and willing to obey, and assist as far as lay in his or their power in facilitating the obedience by the proper parties to the writs and orders of the above-entitled court. And further saith not.

CABELL WHITEHEAD.

Subscribed and sworn to before me this 18th day of January, 1901.

[SEAL.]

R. B. H. LYON,
Notary Public.

(Endorsed:) No. 636. Dep't. 9. Circuit court of appeals, ninth circuit. William A. Kjellman, appellant, *vs.* Henry Rogers, appellee. Affidavit of Cabell Whitehead (No. 2). Filed January 28, 1901. F. D. Monckton, clerk. Page, McCutchen, Harding & Knight, attorneys for appellant, Mills building, San Francisco, Cal.

In the United States District Court, District of Alaska, Second Division.

HENRY ROGERS }
vs.
WILLIAM A. KJELLMAN. }

Affidavit of Samuel Knight.

UNITED STATES OF AMERICA, }
District of Alaska, Second Division, } *ss:*

Samuel Knight, being first duly sworn, deposes and says that he has had exclusive charge of the above-entitled cause as counsel for defendant herein; that the alleged affidavits of Henry Rogers of July 23, 1900, Charles Cooper, and Sol Stumph on file herein were never offered nor read nor considered as having been read in evidence herein nor served upon defendant nor affiant nor called to their or his attention, nor were their existence known to affiant or defendant until after the order of the judge herein of August 10, 1900. That the bill of exceptions herein contains all affidavits used or read or offered in evidence herein.

SAMUEL KNIGHT.

Subscribed and sworn to before me this 16th day of August, 1900.
[SEAL.] C. E. DICKEY,
Deputy Clerk United States District Court, Second Division.

(Endorsed:) No. 636. United States district court, district of Alaska, second division. Henry Rogers *vs.* Wm. A. Kjellman. Affidavit of Samuel Knight. Filed January 31, 1901. F. D. Monckton, clerk United States circuit court of appeals for the ninth circuit.

In the District Court of the United States in and for the District of Alaska, Second Division.

L. F. MELSING ET AL., Plaintiffs. }
vs.
JOHN I. TORNANSES, Defendant. }

Affidavit of Samuel Knight.

UNITED STATES OF AMERICA, }
District of Alaska, Division of Nome, } *ss:*

Samuel Knight, being duly sworn, deposes and says that at all times herein he has had exclusive charge and control of the above-entitled case on behalf of the defendant as one of his attorneys and

counsel; that the proposed bill of exceptions herein comprises and constitutes the entire record hereof and true copies of all affidavits, proceedings and orders used, had, or made herein; that no summons or other process has been issued nor is on file herein; but that at various times from the 23d day of July, to and inclusive of the 10th day of August, 1900, plaintiffs placed on record the following alleged affidavits, to wit:

Affidavit of F. H. Downing, filed July 23, 1900.

Affidavit of E. W. Bacon, filed July 23, 1900.

Affidavit of L. F. Melsing, filed August 10, 1900.

Affidavit of L. F. Melsing in case of Melsing *vs.* Tornensis in old district court for the district of Alaska, filed herein, July 23d, 1900.

Affidavit of complaint in same case filed herein, July 23, 1900, which have never been served upon affiant, nor upon defendant herein or any one representing defendant, nor were such affidavits or any thereof called to the attention of affiant or said defendant until after the filing of the order of the judge herein denying defendant's motion to vacate and set aside the order of July 23, 1900, nor were such alleged affidavits nor any thereof, offered or read or considered as read in evidence upon the hearing of defendant's said motion to vacate and set aside said order.

SAMUEL KNIGHT.

Subscribed and sworn to before me this 16th day of August, 1900.

[SEAL.] H. L. ATKINSON,
Notary Public in and for the District of Alaska.

Endorsed: No. 634. United States district court, Alaska, second division. L. F. Melsing *et al. vs.* John I. Tornanses. Affidavit of S. Knight. Filed January 31, 1901. Frank D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit. Page, McCutchen, Harding & Knight, attorneys for defendant.

In the United States Circuit Court of Appeals for the Ninth Circuit.

WILLIAM J. KJELLMANN, Appellant,
vs.
HENRY RODGERS ET AL., Appellees.

JOHN I. TORNANSES, Appellant,
vs.
L. F. MELSING ET AL., Appellees.

In the matter of the alleged contempt of Alexander McKenzie in having, it is said, disobeyed and refused to comply with the terms of the writs of supersedeas heretofore issued herein.

Testimony.

MONDAY, *January* 28, 1901.

Counsel appearing: Charles Page, E. J. McCutchen, and Samuel Knight, Esqs., *amici curiæ;* Thomas Geary, Esq., for the respondent McKenzie.

The matter of the alleged contempt of Alexander McKenzie came on regularly to be heard on this day, and proceedings therein were had as is hereinafter fully set forth.

Judge GILBERT: We are ready to hear the testimony in these cases against Alexander McKenzie for contempt; that is, in the two cases of Kjellmann *vs.* Rodgers and Tornanses *vs.* Melsing.

Mr. MCCUTCHEN: If your honor please: This order of arrest was issued in the two cases which his honor, Judge Gilbert, has called, upon an affidavit made by Mr. Knight, an affidavit of the same kind having been made and filed in each case. We do not understand that any of the statements of fact made in that affidavit are denied. The answer of McKenzie has not denied any of those facts. In addition to the fact that his answer fails to deny any of the statements in those affidavits, we understand his counsel to have stated here in open court that the statements contained in Mr. Knight's affidavit are true. In view of that, as we understand it, the burden of proof is on the other side. We are perfectly willing to adopt any course which meets with the approval of the court. If the court thinks we should pursue that course and put witnesses upon the stand to prove the statements contained in that affidavit, we are satisfied; but we do not understand, in view of the admissions made by them here, there is any necessity for us to do that; we think that the burden is upon the other side. In other words, it is in the nature of confession and avoidance.

Mr. GEARY: I understand the rule, your honor, in matters of contempt, to be that, as it is initiated by affidavits, when the defendant traverses those affidavits and denies culpability, that such affidavits purge him of contempt, unless, in addition to that, the moving

parties should offer testimony or the court should require testimony, which destroys the effect of that answer. The burden cannot be shifted to the prisoner in a proceeding of this kind, merely by his answer failing to deny the specific facts set up against him. The only admission we make as to the correctness of Mr. Knight's affidavit, as contained in Mr. McKenzie's answer, is as follows: "Defendant admits that the demand for the immediate delivery of the property described in the pleadings herein, and the gold and gold dust, the proceeds thereof, was made on him on the 14th day of September, in the manner and form set forth in the affidavit of Samuel Knight, heretofore filed herein," reading from the answer of Mr. McKenzie in the Chipps case, a change being made merely from the name of Mr. Metson to that of Mr. Knight. We do not admit that we violated any writ. On the contrary, we set forth the fact that on that day it was impossible for us to have obeyed the writ. If that is true, we should not be punished because we were unable to comply with the order, and were not guilty of any contempt. Upon the answer of the defendant, we think he should be discharged unless there is some other proof offered.

Mr. McCUTCHEN: This is a matter in which the court is more vitally interested than any of the parties. We simply ask the direction of your honors. It seems to me that it would be taking up time for no purpose to put witnesses upon the stand to testify to facts which are admitted. The facts set forth in the affidavit of Mr. Knight are not only admitted by the answer, but they were formally admitted by counsel in open court. It is unnecessary to refer to the proceedings which took place here the other day, as your honors are familiar with them. We take it that under those circumstances, the burden is upon the respondent to show the excuse which he sets up by his affirmative defense. The matter is entirely within the discretion of the court, and as it is a matter in which the court is more vitally interested than the parties, we are willing to follow the direction of the court.

Judge GILBERT: Do you put in issue any of the facts alleged in the affidavit?

Mr. GEARY: No, your honor.

Judge GILBERT: None at all?

Mr. GEARY: No. We admit the fact that the demand was made upon us to turn over this gold dust, and we declined to do it.

Judge GILBERT: We think you should show some reason for not complying with the order, by testimony.

Mr. GEARY: We filed the affidavits of all the workmen; showing that we ordered them to quit work at once; we filed the affidavit of the marshal the other day, showing that he took possession of this vault on the 15th of September, 1900, under the instructions of the court, directing that we should not be permitted to go there. To prove our inability to comply with the order, we filed also the affidavit of the manager of the bank, stating that they would not allow us to go near that vault, and that we did not go near it, and that on

a subsequent date, when we attempted to go to the vault, we were stopped, and compelled to get a special order of the court authorizing us to go in there. We offer those facts to show our inability at that time to comply with the order. Your honors will remember that upon the close of that affidavit, we were ready to submit the matter, but the gentlemen on the other side stated they wanted to offer parol testimony.

Judge GILBERT: You have admitted all the facts stated in their affidavits, and they have admitted none of the facts stated in your affidavits, therefore we think the burden of proof is thrown upon you.

Mr. GEARY: Either course is satisfactory to us. If your honor wishes us to go on, we will proceed now.

Judge GILBERT: It is only because you have admitted the facts stated in the affidavits on behalf of the other side, that we think the burden of proof is thrown upon you.

Mr. GEARY: Very well. Will you swear me, Mr. Clerk? I will reserve the right to argue the case, after having been a witness.

THOMAS J. GEARY, called on behalf of the respondent, sworn.

The WITNESS: I was attorney for Alexander McKenzie, the receiver, in Rodgers *vs.* Kjellman, and in Tornanses *vs.* Melsing, on the 14th of September, last year. About half past two that day he sent for me and told me that some papers had been sent up from San Francisco from the circuit court of appeals. About a quarter of an hour after that, Mr. Metson and Mr. Johnson, acting for the defendant in Comptois *vs.* Anderson, presented to Mr. McKenzie a demand, together with a copy of what purported to be a copy of the writ of supersedeas issued by the clerk of this court, and asking him to immediately turn over the gold dust and other property he had belonging to the defendants in those actions. Mr. McKenzie handed me those papers, and asked me to look into them and advise him what his rights were. At that time I stated that I would look into the matter as expeditiously as I could, and would give an answer at once, without any desire to delay the proceedings. The written demands in these two cases came to me after that. I went to the clerk's office of the district court of Alaska upon receiving these papers, and examined the records there, and the only paper that was on file in that clerk's office was a copy of the writ of supersedeas, not even the original. There was not any bond on file nor any citation. That was the only paper we had on that date to govern us in what we did. Later on in the day, I was told that Mr. Knight in this case of Rodgers *vs.* Kjellmann had filed some papers, and I looked at those. That was along towards evening, I guess it was in the evening. That evening I advised Mr. McKenzie that the writ on file, signed by the clerk of this court, was issued by him without any authority. The only paper we had there to govern us in determining the authority of the clerk was the order of Justice Morrow

allowing the appeal and directing that a supersedeas should operate upon the filing of the bond. We will not have any copy or the original of the order of Judge Morrow directing the clerk to issue this particular writ. That paper never reached Nome at any time. It was not known to any of the attorneys or parties until after our return to San Francisco. I assumed in that that the ordinary supersedeas created by statute was the only supersedeas in that case, and that this clerk was without any authority to issue any writ, and that if the writ he issued contained provisions for us to turn over specific property, that that was a broader order than the supersedeas contemplated by the order of Judge Morrow. I advised Mr. McKenzie that night that the best thing to do would be to stop work at once and obey the order of Justice Morrow contained in the order allowing the appeal, which was a stay order, and directing us to cease interfering with the defendants, and I know he immediately notified his foremen and superintendents to close down the mines, come to town, and do no further work. I told him then that the next day I would tell him what to do about the money, as I had not had time to look into that. The money, as I had not time to look into that before that. The next afternoon I was about ready to advise him in respect to that when I was sent for to go before the military forces up there, or rather the major in charge of the military forces, where an application had been made for the military to be withdrawn from the bank to enable the defendants in these actions to take the money by force, they stating that if the soldiers would be withdrawn, who were then in possession of the bank, that they had force enough of their own to go in and take the money by force, and in that manner execute what they called the writ. Along about 6 or 7 o'clock that evening, I told Mr. McKenzie that, assuming an appeal had been taken, of which I was not satisfied that one had been taken—assuming that one had been taken, that the only supersedeas was the statutory one, and that that did not authorize the return of the gold dust to the parties in the litigation; that all that the writ could effect would be to stay further proceedings, leaving the property in the condition it was then in at the time the writ was issued, and I thought I was sustained, and still think I am sustained in that contention, by the Goddard case in the 94th United States. At the time that I advised Mr. McKenzie the next day, the bank was then in possession of the marshal, who had been sent there by Judge Noyes, because of the threats of the defendants in this action to go into that bank forcibly. And I understood that an appeal had been made for police protection to protect that vault. I know that in the evening about 6 o'clock, when Major Van Arsdale rendered his decision as to what the course of the military would be, he prefaced that decision by explaining the attitude of the military, and stated publicly that the military was not there except at the request of the United States marshal, and were in subordination to him, and that they would obey any order which they obtained from the marshal, and we would have to make our application to him. At the same

time he read to us a note which he had received from Judge Noyes stating that he, Judge Noyes, would on Monday, or at once—I am not certain whether it was Monday he was going to make the order or make it speedily—that he would make an order in reference to the gold dust which he thought would be satisfactory to everybody and avoid any necessity for any trouble at the bank. I saw Judge Noyes on Sunday, and he interpreted this order and the supersedeas as being merely statutory one, and only providing for a stay of proceedings, and said it could not contemplate an entire reversal of the order appointing a receiver and the order turning over the property, and that McKenzie should turn over the mines and surrender them, but should retain the gold dust. On Monday, at the opening of the court, I having some desire to see all the papers that had gone up from this court, and assuming that the writ of supersedeas was not standing alone, that there must be something else to support it, asked the court to make an order directing all the attorneys who had papers emanating from the circuit court of appeals and Judge Morrow, to file them. Judge Noyes made that order at the morning session.

Mr. McCutchen:

Q. What date was that?

A. That was on the 17th, directing that all such papers should be filed by 2 o'clock. No other papers were filed between that time and 2 o'clock. I knew then that on Sunday—that Mr. Knight had on Friday and Saturday, and I think again Sunday, made an application to Judge Noyes for an order directing McKenzie to turn over this property, and Judge Noyes had refused to make the order. I talked with the judge on Sunday about it, and he said he did not believe he had authority to do it; that the only order he could make was one staying proceedings, leaving that property where it was. Under those circumstances, I advised Mr. McKenzie not to turn over the money. I think that is all I know about it.

Cross-examination—Mr. McCutchen:

Q. When did the military first assume control of that bank, or of the gold dust in the bank?

A. The military first assumed control of that vault some time in the latter part of August. A report was brought to Mr. McKenzie that an attempt was to be made by some parties in town to wreck the entire bank.

A. At whose suggestion did the military take control of the vaults at that time?

Q. At the suggestion of Judge Noyes. I will explain that. We went to the manager of the bank, told him what we had discovered, and represented to him the inadequacy of protection. He wanted to put in additional protection, but did not care to incur the expense. An application was made to the military, and they declined, on the

ground that they were not doing police duty, but could only act in obedience to the marshal's orders. We then went to Judge Noyes, and he made an order directing the marshal to put a sufficient military force in the bank to protect it. The force continued there day and night, down to the 14th or 15th of September.

Q. Did you understand the representatives of the military who were at that bank were there for the purpose of preventing McKenzie from reaching that gold dust?

A. I did, because they told me so.

Q. When did you first learn that?

A. On the 15th.

Q. What time on the 15th?

A. The afternoon of the 15th, and evening of the 15th.

Q. At this meeting at which Major Van Arsdale was present, did he not state that he had been told by Judge Noyes that the judge would make an order for the carrying into effect of the writ of supersedeas issued by this court?

A. He did not. We had a meeting that adjourned some time between 4 and 5 o'clock. We adjourned until 6 o'clock. At the opening of the military court at 6 o'clock, Major Van Arsdale read or stated—I am not certain whether he read the note or stated that in the interim he had received a note from Judge Noyes, and that note stated that Judge Noyes would make such an order as he thought would be satisfactory to all parties.

Q. He did not say that Judge Noyes would make an order to carry the writ of this court into effect?

A. He did not. I do not think he did.

Q. How many meetings did you have with Major Van Arsdale after the arrival of these papers in Nome?

A. Only the one.

Q. Did you not meet him twice on that day?

A. It was all one meeting. I was sent for, and went there in the afternoon, I think about 3 o'clock. We had some argument, and he asked me what advice I was going to give McKenzie. He said he would like to hear it. I told him I had not quite finished it, and he adjourned for an hour to enable me to give him the substance of what advice I was going to give McKenzie.

Q. When you met him again, did you give him the substance of what you were going to advise McKenzie?

A. Yes, sir, I did.

Q. Was not your advice to McKenzie that the order was not appealable from, and that for that reason he should not obey the writ of supersedeas?

A. That was part of it; not all of it. My advice to Mr. McKenzie was that under the case of Haverman, and the Columbian case, all of which have been cited here, that the order appointing a receiver was not an appealable order. I advised him also that while I did not have any copy of Judge Morrow's order in the Chipps or Comptois cases, that I had seen a copy of the order allowing an appeal

made by Judge Morrow in the Rodgers and Melsing cases, and I assumed that the orders in the Chipps and Comptois cases were like that, and that order only provided that there should be a stay of proceedings, and that he should desist from interfering with the defendants; and that I did not think the clerk had any right to add provisions to any writ founded upon an order of Judge Morrow that were not found in that order.

Q. Did you not advise Mr. McKenzie that the order was not appealable, or did you not say that you had advised him that the order was not appealable, and that, for that reason, he should not obey it?

A. No, sir. I stated that as one of the reasons, that the order was not appealable, and therefore the order was void, and stated the other reason that, assuming that it was appealable, that then the order of the court, or the writ, rather, which we were asked to obey, was issued without authority by the clerk, and contained provisions broader than the order of Judge Morrow, which the clerk had no right to insert.

Q. And the order which you said was void because the order appealed from was not an appealable order, was the order signed by his honor, Judge Morrow, was it not?

A. No, sir.

Q. Did you not advise him that the order of Judge Morrow allowing the appeal was void?

A. Yes, sir, I advised that, because I thought, under the two cases that I have cited, that the order appointing McKenzie being merely an order appointing a receiver and not an injunction order, that Justice Morrow or this court had no jurisdiction of an appeal from the order appointing a receiver. I did not rest my reasons upon that.

Q. Then the position taken at that time was that not alone the writ of supersedeas was void, but that the action of his honor Judge Morrow was void?

A. The reasons given at that time were that no appeal had been taken in any of the cases.

Q. And that no appeal could be taken?

A. And that no appeal could be taken, because it was not an appealable order, and that the writ which we were asked to obey was a writ which the clerk had no authority to issue.

Q. You knew that that writ was issued out of and under the seal of this court, did you not?

A. I did not, because we had no copy of the original.

Q. Had you no copy of the original?

A. I never saw anything but copies of the original.

Q. Was there attached to that copy a signature signed by the clerk of this court, and was it under the seal of this court certifying it to be a true copy of the original?

A. The copies that were served on us were copies certified by the clerk of the district court of Alaska, who certified that they were copies of a copy certified to him by this court.

Q. In other words, the copy which you saw — a certified copy of a certified copy?

A. Yes, sir.

Q. Was there ever any question in your mind about the authenticity of that copy of the writ of supersedeas?

A. Do you mean about the clerk having issued it?

Q. I understood you to say that you never had seen the writ of supersedeas, the original writ.

A. I never saw the original, no.

Q. Was there ever any question in your mind concerning the authenticity of the certified copy which you saw as to whether it was a true copy of an original writ issued out of this court?

A. I don't know how I could pass upon the authenticity of it, not having the original. I did not know Mr. Monckton's signature. But I did not make any point of that. The point I made was that Mr. Monckton had no authority to issue a writ in the case, and if he had authority to issue one, he could only make it as broad as Judge Morrow's order, which was that we should stop proceedings at once and not interfere with the defendants.

Q. Then you assumed that the writ issued out of this court, to which the signature of its clerk and its seal was attached, was issued by the clerk without any authority or direction from any one, did you?

A. I believed the clerk had issued it without any authority that authorized him to do it, and that, because of that, it was a void paper.

Q. Under what writ or order was it that you advised Mr. McKenzie to turn over the property, but declined to advise him to turn over the gold dust?

A. In the case of Rodgers *vs.* Kjellmann, and the case of Melsing *vs.* Tornanses, I saw, either late that night, or the next day, what purported to be copies of the order of Judge Morrow allowing an appeal, and also the citation in those two cases, and then I assumed that an appeal had been taken. I wanted to take the worst possible view of the matter, to be as safe as I could, and then I interpreted the effect of that to be to create the ordinary supersedeas, which did not require any writ from any clerk, or any writ from any court, but was created by the statute itself.

Q. Did that writ, as you understand it, operate so as to entitle the defendants to the property?

A. I thought it did. It entitled the defendant—I did not say I directed the turning over of the property. I directed that he should cease work and withdraw from the property.

Q. That he should withdraw from the property?

A. Yes, sir.

Q. Was it your understanding that that withdrawal would entitle the defendants to go in and take possession?

A. That was a matter I was not figuring on. I was simply trying to have the receiver obey the supersedeas. The writ of supersedeas enjoined him to stop and not to proceed further, and I directed him to do that, and understood that he did.

Q. You understood that the writ of supersedeas in effect ordered him to surrender possession of that property?

A. I did not. I understood the effect of the writ of supersedeas was that the receiver should not proceed further as a receiver. Of course that meant that he should not proceed to further operate as receiver of the properties, and I directed him to stop further proceedings——

Q. (Interrupting.) But should hold possession?

A. The matter of possession was not passed upon that night. He immediately went out and telephoned to the mines, stopping work and directing the men to come to town. Before anything else could have been done your people took forcible possession the next morning.

Q. But you gave no direction in regard to the possession, you say?

A. I would not say now that I did at that time. I think the main matter that night was to comply with the writ, as far as we were compelled to, by stopping proceedings.

Q. The next day you ascertained that the marshal had taken possession of the gold dust?

A. Yes. That was on the 15th.

Q. Had you any intention of advising McKenzie on the 15th to turn over the gold dust?

A. On the 15th I advised Mr. McKenzie that, under the writ of supersedeas, he was not compelled to turn over the gold dust. At that time I knew, before I gave that advice to Mr. McKenzie, that the marshal had taken possession of the bank.

Q. The fact that the marshal had taken possession, then, was not controlling with either you or Mr. McKenzie, so far as the refusal to obey the writ of supersedeas was concerned?

A. Yes, sir, it was.

Q. To what extent?

A. When Mr. McKenzie requested me to advise him, I went to examining the matter, and prepared a letter to him intending to deliver it to him the next day, or as soon as I had completed it. That letter was completed about 6 o'clock Saturday night. During the discussion before Major Van Arsdale on Saturday afternoon the matter of the custody of that money was presented to us, and the Major inquired if we would not all agree to let that money remain undisturbed until the court made its order, all hands withdrawing from the bank and leaving the money in the custody of the marshal. I expressed myself then as perfectly willing. I declared that we had not any desire to remove the dust or disturb it. The other people would not agree to that, and suggested to Major Van Arsdale that if he again would take his soldiers away, they would go in there with force and take that property, and if necessary would break the bank boxes. It came out in that discussion that the time-lock would be placed on that vault about 5 o'clock. Major Van Arsdale said he would not decide the matter until 6 o'clock. They

then requested him to direct the bank officers not to put the time-lock on until 8 o'clock, so that if he decided to withdraw the military, they could crack the bank that night. That he declined to do, and then stated that his soldiers were there in obedience to the orders of the marshal. While we were discussing that Major French, second in command there, entered the room, and told Major Van Arsdale that the marshal had requested an additional squad of soldiers to be sent to the bank, as he feared that night there would be some attempt to break it. I knew then that the marshal had taken possession of the bank.

Mr. McCUTCHEN: Will you repeat the last question, Mr. Reporter? I do not think the witness has answered the question.

(The reporter reads the question as follows: "Had you any intention of advising McKenzie on the 15th to turn over the gold dust?")

A. I do not know how I can answer that any plainer than I have. I stated at that time that I advised Mr. McKenzie that evening after 6 o'clock that in my opinion the supersedeas did not require him to turn over the money.

Q. Did you ever advise him after that that the writ of supersedeas did require him to turn over the money?

A. I did not.

Q. Did he ever, so far as you know, express any willingness to turn over the money, at any time after that?

A. After that time we had no control over the money and could not have done it if we had wanted to.

Q. Coming back to the question I put to you a moment ago: The fact that the marshal had taken possession of the bank never had anything to do with Mr. McKenzie's action?

A. I do not want to say that.

Q. Did he ever communicate to the marshal his willingness to turn over the money?

A. One moment now. Prior to the 14th of September, on the application of these defendants, the court made an order, which I think is in the record here, directing us to deposit that money in that particular bank, and leave it there until the further order of the court. When that order was made by Judge Noyes—I think that was about the 24th of August—I then notified Mr. McKenzie that the effect of that order was that he must not take any money from that bank without first getting an order of court. On the 15th of September, when these matters were under discussion there, while advising him as to what he might do, that Judge Noyes, or the court, would have to make an order before we could go to that bank, was assumed by both of us.

Q. At any time after the 15th of September did Mr. McKenzie fail or refuse, so far as you were advised, to turn over any money or gold dust which came from any one of these claims, except so far as he was prevented from doing so by the fact that the gold dust was in the possession of the marshal?

A. Read the question, please.

(The reporter reads the previous question.)

A. After the 15th of September there was not any demand made upon Mr. McKenzie to do anything.

Q. Was all of the gold dust that Mr. McKenzie had received as receiver in the vaults of this banking company on the 15th of September?

A. No, sir.

Q. Where was there any other portion of it?

A. There was some gold dust in an outer safe in that same bank which was placed there on the 15th.

Q. It was placed there on the 15th?

A. Mr. McKenzie went there on the 15th to deposit some gold dust, and was refused admission to the bank, and so the gold dust was placed in an outer safe in the same bank building.

Q. That was after the marshal had taken charge, was it?

A. That was after the marshal had taken chage.

Q. Then on the 15th——

A. (Interrupting.) One moment now. He went there with the gold dust that was in transit, and came to him in town that day, and he wanted to place it in the vault where the rest of the gold dust was, but he was refused access to that vault, and it was afterwards taken by the manager of the bank and placed in an outer safe in the outer office, not with the other dust.

Q. So the marshal had no control over that part of the gold dust?

A. No, sir.

Q. Did McKenzie ever offer to deliver that gold dust?

A. I don't think any demand was ever made on him, and I don't think that any of this dust is dust that was taken from the Rodgers-Kjellmann claim or the Melsing-Tornanses claim.

Q. Do you not know that on the 16th of September Mr. McKenzie had in the safe on Discovery claim several thousand dollars' worth of gold dust which came from No. 10?

A. I do not.

Q. Do you know whether he had any gold dust there at that time or not?

A. On what date?

Q. On the 16th of September.

A. You mean from No. 10?

Q. Yes, from No. 10.

A. No, I do not.

Q. Do you know whether he had any from No. 2 Below Discovery, the Calvin claim?

A. No, sir, I do not.

Q. Do you know that he did not have?

A. No, sir, I do not.

Q. Do you know whether, on the 16th of September, there was brought in from Discovery claim some gold dust which had, prior to that date, been taken from No. 2 Below Discovery?

A. I do not think that is cross-examination of the testimony in this case. I do not think that is pertinent. I understood that the court was to take testimony in the Rodgers-Kjellman and Melsing-Tornanses cases, and not in the Chipps case. I presume I must object to that.

Q. What I am inquiring about, Mr. Geary, is this: I ask you if you know whether or not there was on Discovery claim, on the 16th of September, some gold dust which had been taken from No. 2 Below Discovery?

A. That I object to answering, upon the ground that it is not pertinent to the matter we are investigating, unless the court rules otherwise. I understood the ruling of the court to be that we are here to take only testimony in the Rodgers-Kjellmann and the Melsing-Tornanses cases, so that our dealings under the writs in the Chipps case cannot be pertinent to this inquiry.

Mr. McCUTCHEN: What I am inquiring about, if your honors please, is this: I have no objection to stating exactly what we want to show. We desire to show that on the 16th of September, that is, a day after this second demand was made on Mr. McKenzie, there was in a safe on Discovery claim, and in order that your honors may understand that, I may suggest that Discovery claim was a sort of headquarters for the receiver, and that he had in that claim a safe in which he kept the gold dust taken out of all these claims in which he had been appointed receiver, and, as he made a clean-up, he took the dust from that clean-up to Discovery, and there temporarily deposited it in the safe on Discovery, and from time to time he would take the dust from that safe and take it into Nome and put it into the vaults of this banking and safe-deposit company referred so. What I want to show is (and I think the question is certainly cross-examination) that on the 16th of September he had some of that Kjellmann gold in the safe on Discovery, and that he brought that dust into town on the 16th of September, and has that in his possession yet. We will argue from that that the excuse which he makes here in relation to the action of the marshal preventing him from turning over this gold dust is entirely without merit; that he could have turned over the gold dust which came into town on the 16th, but, so far from showing a desire, as he says in his answer he had the desire, to comply with the order of this court, he did not comply with it, and he has not complied with it up to this time.

The WITNESS: We submit the matter should be confined to the two cases that we are on trial for.

Judge GILBERT: We think the question is proper.

The WITNESS: The defendant excepts. Read the question.

(The reporter reads the previous question as follows: "I ask you if you know whether or not there was on Discovery claim, on the 16th of September, some gold dust which had been taken from No. 2 Below Discovery?")

A. I do not.

Mr. McCUTCHEN:

Q. Do you know whether Mr. McKenzie received, after 12 o'clock on the 15th of September, any gold or dust that came from No. 2 Below Discovery?

A. I do not. I know Mr. McKenzie received gold from either No. 2 or No. 10, and——

Q. (Interrupting.) 2 or 10?

A. One moment. (Continuing:) I know that he received gold or gold dust from either No. 2 or No. 10 on Saturday, after the bank was taken possession of by the marshal, and that that gold dust was taken to the bank to be placed by Mr. McKenzie in the boxes where the rest of the gold dust was, but that he was refused access thereto, and it was afterwards placed by the manager of the bank in an outside safe in the outside office.

Q. What became of that gold?

A. I guess the marshals took it when they went up there.

Q. Do you know whether Mr. McKenzie has any of the gold now that was taken out of No. 2 or No. 10?

A. I could not answer that.

Q. Has he not told you he has?

A. I don't know whether I have a right to tell you what Mr. McKenzie told me or not. I am telling all I know myself. I know this about the dust: That we obtained orders of court directing the sale of dust from No. 2.

Q. I am not inquiring about that.

A. One moment. The question is, if I do not know that he has dust.

Q. From No. 2 or No. 10?

A. I am going to answer that question. I know we obtained orders of court directing us to sell dust from No. 2 and No. 10. I am pretty sure from both of them, some time prior to the 14th of September, for the purpose of paying operating expenses, and my understanding is that that dust was sent out to be sold in Seattle in obedience to those orders. Whether it was sold or not before the writs came, or whether McKenzie still holds that particular dust, I am not certain.

Q. Do you know whether McKenzie now has in his possession any gold dust taken from No. 2 or No. 10, or the proceeds of any gold dust taken from either of those claims?

A. I don't think McKenzie has in his possession at the present time any gold or gold dust taken from any of the mines.

Q. Do you know whether he has any under his control?

A. I know there is some gold dust belonging to those mines in the United States branch mint or assay office, whatever the title of it is, at Seattle.

Q. Subject to whose orders?

A. I suppose to the receiver's orders.

Q. Do you know why McKenzie has not turned that over?

A. Why he has not turned it over? In the first place, there has

not been any demand made on us for the turning over of anything since the 15th of September last. Secondly, I do not think, under the statutory supersedeas, that McKenzie is required to turn it over, and have so advised him.

Q. You have advised him?

A. Yes, sir.

Q. Notwithstanding the fact that in October this court made an order in open court directing the marshal for the northern district of California to enforce that writ of supersedeas?

A. I never saw those writs.

Q. Did you not see them when the marshal went up there?

A. I never saw the originals, and never saw the warrant upon which this man was arrested, that is, the original.

Q. Did you ever inquire for it?

A. All the conversation we had with the marshals was, they arrested McKenzie, brought him to my office, and went off and got the money. No demand was ever made on me, and I do not think any demand was ever made on McKenzie, that he should turn over to them any gold dust, by these marshals.

Q. You say, Mr. Geary, that since that time you have advised Mr. McKenzie that the action of this court was void, and he should not obey its writs?

A. I have told Mr. McKenzie that the supersedeas purporting to have been issued by this court was void.

Q. What have you told him in relation to the order issued by this court in October?

A. The order for his arrest?

Q. The order for his arrest and directing the marshal for the northern district of California to enforce the writ of supersedeas.

A. I never advised about him about the marshals, because they never made any demand on us to do anything in the matter. They went there and enforced the writ, and never communicated to us anything about it.

Q. You wish to be understood as saying that the only reason why Mr. McKenzie has not complied with this order, so far as this other money is concerned, is, that other demands have not been made upon him?

A. One reason why he has not turned over the balance of the money is that McKenzie, in operating those mines, expended something, I think, like approximately $50,000. No accounts have ever been settled for him, and no order of the court has ever been made directing him to turn over any money. My contention has been that before the receiver can be charged with a balance in his hands, there must be a settlement of his accounts by the court appointing him, and some balance ascertained, and that until that is done, there is no certain fund which the receiver is obligated to turn over.

Q. Mr. Geary, you know that an appeal was taken in this case, do you not?

A. An appeal was taken in this case? No, I did not know it

until this court decided a week ago that in the case of Rodgers *vs.* Kjellman and Tornanses *vs.* Melsing they thought appeals had been taken. I did not believe it prior to that time.

Q. You know some proceedings had been taken by the appellants?

A. I knew they had attempted to do some things, and I thought they had failed in their attempt.

Q. You know in October of last year, this court made an order directing the United States marshal to enforce the writ of supersedeas which had been issued by the clerk of this court?

A. Not believing this court had jurisdiction of the cause, and no appeals having been taken, I thought the writ was as void as the original writ, and so advised McKenzie.

Q. After that writ had been served upon him, McKenzie, did you advise him not to obey that writ?

A. Yes, sir, it did not change my opinion at all. If the original proceeding was void, and the court had issued a writ it had not authority to issue, it was void; I assumed that this court, at the time it issued the warrant for McKenzie's arrest, believed that an appeal had been taken, and that the fact of there being no appeal up there, and of the condition of the records there had not been called to its attention at that time, or it would not have issued those writs.

Q. Do we understand that the reason McKenzie has never turned over this money, which never reached the possession of the marshal, is that you advised him that the writ was void, and that that is the only reason?

A. I advised him the writ was void. I have advised him that the order of this court should have been directed to the lower court, and that his, McKenzie's, accounts should be adjusted, and the writ could not run to take from him all the personal property, and leave him with the debts unpaid. I did not believe this court, or any other court, would make such an order when they had the facts before them, and I believed that they had been imposed upon in the applications for that order by the concealment of those facts.

Q. Was it because you believed that the court had been imposed upon, or that its action was void?

A. I thought it was both. When I read the order of Judge Morrow in the Chipps case, directing that on the taking of a bond for $35,000, $110,000 of dust should be seized and turned back to the parties, I thought Judge Morrow must have been misinformed as to the amount of dust we had on our hands, or he would — ordered a greater bond, and I argued from that that all the facts were not presented to him when the application was made to him.

Q. How much money has McKenzie in his possession in these two cases of Kjellmann *vs.* Rodgers and Tornanses *vs.* Melsing?

A. I don't know.

Q. About $12,000 or $13,000?

A. I could not tell. I have never balanced the matter and do not know. The accounts have never been settled, and I do not know

how much he is to be charged with, and how much credited with. I understand most of the bills have been paid in those cases. The balance I do not think have been settled.

Q. You stated that Judge Noyes had made some order. How do you know he made any order?

A. Judge Noyes told me he would make the order on Sunday.

Q. Judge Noyes told you he would make the order on Sunday?

A. Yes, sir.

Q. Do you not know that the only order he ever made was the order staying proceedings?

A. That is the only order I thought he had authority to make; that his duty ceased when he had ordered a stay of proceedings, and directed the preservation of the fund to await the final judgment of this court

Q. When did he make the order which you say was made, ordering the United States marshal for that district to take possession of that gold dust?

A. That order was made on Saturday.

Q. Did you ever see it?

A. No, sir, I did not.

Q. Did you ever hear anybody who claimed to have seen it?

A. I heard Judge Noyes give it to the marshal.

Q. What was his language when he gave the order to the marshal?

A. I went over to see Judge Noyes on Sunday, not particularly about the case. He had been sick for two or three days. While there, the marshal came in and stated what had been done the day before, and asked Judge Noyes if there was any change to be made in the situation. Judge Noyes said, "No, you go ahead and keep possession of the gold dust, and do not let McKenzie or any of the parties go near it."

Q. When the marshal reported to him what had been done the day before, did he say that an effort had been made by the defendants to get possession of that gold dust under the orders which this court had made?

A. I do not know whether there was anything said by the marshal. Of course we all knew and assumed, in all the conversations, that on Friday the people whom you represent had gone to that bank, and had demanded access to the boxes, and had threatened to go in there and take the money by force, and it was for that reason, and in order to keep the peace, prevent a row and preserve the property, that Judge Noyes made the original order to the marshal, as I understood.

Q. How did that breach of the peace happen to be threatened? Who had declined to give this property to the defendants?

A. I was not there. I only know what I heard from the different parties. I understood that the Lane people went there, some number of them, intending to go into the vaults at once and take the dust, but they were stopped by the soldiers.

Q. Is it not a fact that the breach of the peace was due entirely to the refusal of McKenzie to carry out the order which this court made?

A. At that time no order had been served upon McKenzie of any kind or character.

Q. How do you know?

A. Because all of the parties have so testified and told me, all the parties who knew anything about it; that the first paper served upon him was served upon him as he came out of the bank after the row.

Q. Do you understand, then, that the marshal was directed by the court to go there simply to prevent a breach of the peace?

A. The marshal was directed in the first instance to go there, when the first order was made, and preserve the peace. Judge Noyes told him not to allow McKenzie or any one else to go near that dust until he gave him further orders.

Q. At that time, you say, there had been no service of any papers upon anybody?

A. I did not.

Q. Had there been any service at that time?

A. I did not say that.

Q. Did you not say, at the time the breach of peace was threatened, no papers were served?

A. That was on Friday, and the testimony is that McKenzie was served—I think that is admitted that it was after McKenzie came out from having the altercation with the Lane people that the papers were served upon him outside of the bank.

Q. Then no service had been made upon any one when that breach of the peace was threatened?

A. That is my understanding.

Q. You understand that it was because a breach of the peace was threatened that Judge Noyes made an order directing the marshal to go there?

A. My understanding is that the marshal was sent there in the first instance to preserve the peace; that on Saturday Judge Noyes directed him to take possession of that vault, and not let McKenzie go near it.

Q. Do you understand that was after Judge Noyes had been advised of the action of this court?

A. Judge Noyes must have been advised of it on Friday. As I understand, Mr. Knight went to him upon Friday evening, with an order directing McKenzie to turn over the property, requesting him to sign it, and he refused to sign it.

Q. Did not Judge Noyes tell you, in the conversation which you had with him, that that was not an appealable order, and he would not recognize the action of the appellate court?

A. Judge Noyes said he did not think it was an appealable order; but, assuming it was, that the only supersedeas that would be effective was the one staying proceedings, and that on the record as it

was, there was no justification for your demanding the returning of the property; that the property should be held to meet the final judgment of this court.

Q. Do you know who first interviewed Judge Noyes about this matter?

A. I heard that Mr. Knight did.

Q. On behalf of Mr. McKenzie, I mean.

A. On behalf of Mr. McKenzie?

Q. Yes.

A. I don't think any one.

Q. Do you know whether McKenzie went to the judge?

A. I think McKenzie saw Judge Noyes on either Saturday or Sunday. I don't know exactly when.

Q. What I am trying to get at is, whether you know at whose instance or suggestion Judge Noyes directed the United States marshal to go to that bank and take possession or charge of the gold dust.

A. The marshal was not directed to go to that bank and take possession of the gold dust at either the instance of McKenzie or myself. That order was made by Judge Noyes upon a representation made to him both by the military and Dr. Whitehead as to the condition of affairs at the bank. The marshal was directed to go there because it was generally believed that if the money was out of the control of McKenzie, it would be satisfactory to your clients, who expressed themselves as being afraid that McKenzie would take that money out of the bank and take it out of the Territory, and if we surrendered the property to the marshal and released our control over it, that your people ought to be satisfied if the property was kept intact.

Q. So far as you were advised at that time, none of these papers that had been issued out of this court, or signed by Judge Morrow, had been served upon anybody?

A. What date?

Q. I am speaking now of the 14th of September.

A. On the 14th the first papers that were served on McKenzie, I think we all agree, was at a quarter to 3.

Q. What I am trying to get at, Mr. Geary, is this: The service of these papers, as you understand it, was subsequent to the direction of Judge Noyes to the marshal to go there and preserve the peace?

A. The row, as I understood it, occurred about 12 o'clock. The marshal and military had then possession of the bank, in order to preserve the peace. I think all the parties who had gone there had withdrawn from the bank.

Q. At that time no suggestion had been made that there had been any action taken by this court?

A. It was known that the writs of supersedeas were out as soon as they came. I guess they were shown up immediately after they were brought ashore. I did not know they were writs of supersedeas. I guess most people did. I learned about them about half past 2, I think.

Q. You say that the disturbance was at what time?

A. I think about noontime the disturbance occurred; I was not there.

Q. I ask you again, so far as you were advised, the action of this court was not known until after that disturbance?

A. I tell you the paper was served upon McKenzie immediately upon his coming out of the bank after the row.

Q. That was the first intimation McKenzie had and the first intimation that you had, that any action had been taken by this court, or one of the judges of this court?

A. The first knowledge I had was later in the afternoon when I was sent there. I was not in town at noontime. I went down and they showed me these papers.

Q. When was it, as you understand it, that Judge Noyes gave this direction to the marshal?

A. I understood that Judge Noyes, in his conversation with the marshal, gave him the direction on the 15th.

Q. On the 15th?

A. Yes, sir; on the 15th.

Q. That he gave him no direction on the 14th?

A. I do not say that. I say I was present when the marshal came in and told Judge Noyes what he had done, and asked him if there was any change in the situation.

Q. You have stated that Judge Noyes directed the marshal to go to the bank in order to preserve the peace?

A. Yes, sir.

Q. I ask you at what time on the 14th he gave that direction, as you understand it?

A. That I cannot tell. I know the marshal was in charge of the bank. I know the order of direction was given to that effect, because he was so in charge of the bank, but I do not know when the order was given.

Q. Do you know whether there were any keys to the vaults in which this gold dust was placed?

A. I never saw the boxes in that vault, and I never saw any keys.

Q. Independently of that, do you know whether there were any keys to those vaults?

A. I do not.

Q. Do you know of your own knowledge or from any information from Mr. McKenzie to that effect, that Mr. McKenzie retained the keys to those vaults until after the arrival in Nome of the United States marshals, who went there on the order of this court to enforce its writ?

A. I don't know anything at all about the keys.

Q. Don't you know that Mr. Burnham, the deputy United States marshal who went to Nome in company with Mr. Monckton, to enforce that writ, demanded the keys to the vault from Mr. McKenzie, and McKenzie declined to deliver them the keys?

A. I do not. It was not done when I was present.

Q. You do not know that fact?
A. No, sir.
Q. Did not Mr. McKenzie consult you about that?
A. I think not. I do not think I ever knew anything about the keys.
Q. Don't you remember that McKenzie stated to Mr. Burnham he would not surrender those keys unless advised by his attorney to do so?
A. I do not. I do not think I was present at any such conversation between him and McKenzie.
Q. And you say McKenzie never, so far as you now recall, consult you about that at all?
A. I don't think we ever talked about the case.
Q. Do you know how the United States marshals ever got access to that vault?
A. Only from what I was told.
Q. Do you know whether they used the keys to open the vault and get the gold dust?
A. I do not, except as I was told, they broke the boxes.
Q. You were told that they broke the boxes?
A. That is the testimony.
Q. Do you not know, Mr. Geary, that they did not have the keys?
A. I do not. I was not present at the bank, and only know what is purely hearsay.
Q. Did you ever hear anything about those keys at any time after that?
A. Did I ever hear?
Q. Yes, what became of the keys?
A. Do you mean from McKenzie?
Q. Yes.
A. No, sir.
Q. Did you ever hear from anybody what became of the keys?
A. That is not evidence. I think that is hearsay testimony.
Q. I do not understand there is any rule which prevents the court from receiving hearsay testimony in a case of this kind.
A. I think the rule in contempt cases is the same as in any other case, that the testimony must not be hearsay.

Mr. McCUTCHEN: I think, if your honors please, that all the testimony of this witness has been practically hearsay testimony.
The WITNESS: Not all of it, no.
Judge GILBERT: We will exclude this testimony as hearsay.

Mr. McCUTCHEN:

Q. Mr. Geary, do you know whether any of those keys were ever in the possession of the United States attorney up there?
A. No, sir, not to my knowledge.
Q. Do you know it from any statement made to you by McKenzie?

A. I do not.

Q. Did not McKenzie tell you he had delivered those keys to Mr. Wood, the United States attorney?

A. I don't think so. I have no recollection of McKenzie telling me anything about the keys. I don't think I ever talked with him about them.

Q. Did Mr McKenzie consult you at all in relation to the demand made upon him by Mr. Burnham and Mr. Monckton?

A. I do not understand that any demand was ever made on him by them.

Q. That is not an answer to the question. Did he consult you in relation to any demand or request?

A. Mr. McKenzie never told me that any demand had been made upon him by Mr. Burnham and Mr. Monckton after their arrival in Nome.

Q. Did he ever consult you in relation to turning over the gold dust in the vaults up there?

A. I don't think we had any conversation, because there was nothing said to McKenzie about it.

Q. You understand that the United States marshals went down there and opened that vault in the manner you have described?

A. I have not described it.

Q. Without any effort to get the keys from McKenzie?

A. I don't know how they opened it. I have never been in the vault, and don't know.

Q. At any rate you understand they went there and opened the vault without any effort on their part to get the keys from McKenzie?

A. All I can say is that I know of no demand having been made upon them by McKenzie to open the vaults, or let them in the vaults, or give them the keys. I have no recollection of any such conversation. I do not think any such took place while I was there, or ever heard of.

Q. Did you ever see the United States marshals in company with McKenzie?

A. Very frequently.

Q. Did you, on the day they arrived there?

A. Most of that day.

Q. Where?

A. At my office.

Q. What was the subject of conversation at that time?

A. I don't think there was much.

Q. Did the marshals say anything to you about it being a part of their duty to enforce that writ?

A. I think all the marshals said—I met them about 10, I don't know whether it was 10 or 11 o'clock, I would rather say 10, between 10 and 11, I think. McKenzie had been arrested then. I know he had been arrested, and Mr. Metson came over from court, it was after court convened, and told me McKenzie had been

arrested, and that he wanted to see me in my office. I went over there. He was then in the custody of the marshals. I asked them to give me a copy of the warrant. They said they had not any copy. I think they had the original warrant there. I glanced over it and told them they need not be at all alarmed I did not intend to make any technical objections to the warrant, and that Mr. McKenzie would go with them, and in fact was ready to go out then, at any time. I asked if they would accept bail for him until such time as the steamer sailed. They said they had no authority to do so. I think Mr. McKenzie was turned over to Mr. Burnham by Mr. Monckton, and that Mr. Monckton then left the rooms. I don't think there was anything more said. I have an idea that Mr. Knight was there, but I think he went out immediately after I came in.

Q. What I am inquiring about, Mr. Geary, is whether there was any conversation between the marshals and Mr. McKenzie in your presence in relation to this gold dust?

A. I don't think there was. I have no recollection of it. I think I have told about all the conversation I recall hearing between the marshals and Mr. McKenzie.

Q. You knew it was part of the duty of the marshals to see to the delivery of that gold dust to the defendants, did you not?

A. I don't think I ever saw the writ that they brought up there. I think the only paper I saw in my office was the warrant for the arrest of McKenzie. I think I looked at that to see the form of it, and asked for a copy of the warrant. But I don't think they showed me the writ, or that I saw it. Immediately after I came there, I asked if they would take bail, that we would like to give bail for McKenzie until such time as the steamer departed. They said they could not do that. I don't think I saw McKenzie again until late in the evening. I think he went out and did not return; I have no recollection of seeing him.

Q. Did you see any warrant for McKenzie's arrest other than the order made by this court, directing the enforcement of that writ of supersedeas, in which order was embodied an order for the arrest of McKenzie?

A. I could not say now, but I know the only thing I paid any attention to at that time—the court was in session and I had some cases coming on, and I was anxious to get back—I looked at the form of the warrant to see the cause of the arrest, and asked if they would take bail, and they said they would not. There was some conversation, I think, to the effect that he would have to remain in the custody of the marshals, and they took him to the other room. I rather think I saw McKenzie later in the day, and went back to court. That would be my present recollection.

Q. At any rate, you do not recall now the fact that the order for the arrest and the order for the return of that property was embodied in the same paper?

A. As I tell you, no copy of the order was ever served on us. As I went into the room, the marshals sat with McKenzie. I asked

them what authority they had for arresting him. They showed me what purported to be the original paper. I asked if they had served any copy upon the prisoner, and they said no, that that was the only paper they had. I immediately handed it back to them, telling them that I did not intend to make any objection to the form of the writ or the sufficiency of it, and I don't think I ever saw it afterwards.

Q. Did you understand that the United States marshal was ever in possession of that gold dust?

A. Do you mean Mr. Vawter?

Q. Yes.

A. Yes, sir.

Q. Do you know that McKenzie withdrew some gold dust from that bank upon the 10th of October?

A. I do.

Q. Do you know who was present when he withdrew it?

A. No, sir, I do not.

Q. Were you there?

A. I was not.

Q. You do not know, then, whether McKenzie went to the vault and took that money out without any request being made to or consent obtained from the United States marshal?

A. I know he did not take it out until we first got the consent of the United States marshal, because I went to the marshal myself.

Q. What kind of consent did you get?

A. First in the morning I got the stipulation, I think it is in evidence here, signed by Mr. Knight, or by your firm, and I think by Hubbard, Beaman & Hume, a stipulation providing that Judge Noyes should make an order authorizing McKenzie to withdraw from the vault something in the neighborhood of $9,000. Mr. Clerk, I wish you would find that order. I think it is in one of our exhibits offered the other day—a stipulation providing for the making of an order. That stipulation provided that Judge Noyes should make an order authorizing or directing McKenzie to withdraw so much dust from the bank. Judge Noyes endorsed on that "So ordered" or "allowed." I got the order, I took it down and gave it to McKenzie, and told him he could go to the bank, withdraw that much dust, and pay the bills owing to Dr. Whitehead. Shall I read it? "In the district court of the United States, in and for the district of Alaska, second division. Henry Rodgers, plaintiff, v. William A. Kjellmann, defendant. L. F. Melsing *et al.* v. John I. Tornanses, defendant.

"It is hereby stipulated and agreed by the parties hereto, without prejudice to any of their rights by virtue of the proceedings had heretofore herein, that an order may be forthwith made and entered herein, authorizing and directing Alexander McKenzie, heretofore appointed as receiver in the above-entitled causes, to withdraw from the vaults of the Alaska Banking and Safe Deposit Company, and thereafter forthwith deliver to said bank gold dust of the value of

$9,149, in payment of checks drawn upon said bank by said McKenzie as such receiver, under an arrangement heretofore made with him by defendant herein, The Wild Goose Mining and Trading Co., for and to expedite the payment of laborers previously employed upon the placer mining claims known as No. 2 Below and No. 10 Above on Anvil creek, Cape Nome mining district, and for the further payment of interest and commission charges of said bank.

"Dated 10 October, 1900.

"HUBBARD, BEAMAN & HUME,
"*Attorneys for Plaintiffs.*
"PAGE, McCUTCHEN, HARDING & KNIGHT,
"*Attorneys for the Defendant Wild Goose Mining and Trading Co.*

"So ordered.

"ARTHUR H. NOYES, *Judge.*

"10 Oct., '00."

I gave that to McKenzie that morning; along about 9 or 10 o'clock, he started down to the bank (and I stopped on the street talking to somebody) to execute it, and on the way he met Dr. Whitehead, and they had some conversation, and both Whitehead and McKenzie then came back to where I was. Whitehead said that McKenzie had presented to him this order, and that he would not let McKenzie go into the bank and take out that dust. I asked him why, and he said, "Because Mr. Knight has notified me that Mr. McKenzie has no right to go into that bank, and that he must not be allowed in there except in the presence of the parties to the litigation." I said, "But here is an order of court directing him to go there and get the gold dust." "Well," he said, "the United States marshal has charge of that vault, and I am acting under his orders, and I will tell you now that McKenzie shall not go into that bank." I thought the order was sufficient, and so did McKenzie, and McKenzie got a little angry about not allowing him to enforce the order. So Dr. Whitehead said to me further at the time, "McKenzie cannot go in there, because on each change of the guard placed over the bank, instructions are given to the soldiers that under no circumstances must McKenzie be allowed to go to the bank." I said, to Mr. Whitehead, "Do you mean to say that each day those orders are repeated?" He said, "With each change of the guard, those orders are given." Then I sent a messenger to the marshal's office, which was two or three doors below. The marshal came in. I handed him the order, and he said he would have to get a special order from Judge Noyes; that he supposed this was sufficient, but he preferred for his protection to have a special order. I told him I was not going to get any further order; that there was the order, and if he did not obey it, I could not help it. By an agreement between the parties, it was agreed that McKenzie should not attempt to go

near the bank until 2 o'clock, and meantime the marshal was to go and get an order. The marshal came to me and told me later he had seen Judge Noyes, and the judge directed him to let McKenzie take out that much dust, and when that dust was removed, to close the box and not let McKenzie go back again until he gave further orders. I did not go with McKenzie at 2 o'clock, and only know by hearsay what happened there.

Q. Do you know who went there with him?

A. I don't know. I don't think anybody. I don't know of anybody. I saw Dr. Whitehead between that time and 2 o'clock, and he told me that the marshal had told him it was all right, or something to that effect, and that at 2 o'clock matters would be attended to.

Q. Do you know whether at that time Mr. McKenzie had the keys to the vault?

A. I don't know. I don't think I talked with him about the keys. It was a safe-deposit box, and the bank kept the master key and the depositor had his key, and the box could not be opened without the consent of both. Dr. Whitehead said he would not let him go there, and I supposed that was the end of it.

Q. Do you know whether Mr. McKenzie ever had any of the gold dust from either of those claims on deposit with the North American Transportation Company?

A. I could not answer that yes or no.

Q. Did you ever hear from him that he had?

A. No, sir. I know that McKenzie had some dust that came into him on deposit with the North American Transportation Company, but where the dust came from, or whose it was, I never knew and never inquired.

Q. Do you not know that that was part of the dust that was sent to Seattle to be converted into money?

A. I do not. I know nothing about the identity of that dust. I only know from hearsay. I guess I learned that from examining the accounts of the receiver, or I found checks drawn on the North American Transportation Company.

Q. That is, from examining the accounts of the receiver, you learned that some of the dust from these claims was deposited with the North American Transportation Company?

A. Yes, sir; but I don't think I ever learned what dust it was, or whose claim it came from, or the amount of it.

Q. Who do you say was present at the time Major Van Arsdale said that the military were at the bank in subordination to the United States marshal?

A. I think that all the attorneys were present.

Q. Was Mr. Metson present?

A. I know Mr. Metson was present.

Q. Was Mr. Knight present?

A. I think Mr. Knight was there; I won't be certain.

Q. Can you tell us who else was present when Major Van Arsdale made that statement?

A. I remember in the afternoon when we adjourned all were present. When we came back in the evening it was dark, and I don't know that I saw all the parties. No lights had been lighted, but I think I saw most of the parties who were there in the afternoon. Mr. Metson does not agree with me about his being present at the time, but I am positive I saw him and I talked with him in the evening, because, at the close of Major Van Arsdale's decision, some one of the parties, I always thought it was Mr. Metson, asked the Major that if any change was made in his ideas about the guard, that is, if he ever concluded to withdraw the guard, if he would not give them sufficient notice to get ready. I think I suggested a better way would be to fix the time so that both of us would have a reasonable notice, and I think he gave us two hours' notice. I think he said he would give us two hours' notice. It was my idea that Metson and I made that agreement.

Q. Did Major Van Arsdale make that statement more than once, that the military was there in subordination to the United States marshal?

A. When Major Van Arsdale commenced to give his decision, he stated, as preliminary to it, "I wish to clearly define the functions of the military. We are not interfering, by virtue of any military law, but merely acting in the nature of a posse in subordination to the marshal, to assist him in the performance of his duties." I had taken exception to the rights of the military to interfere there by virtue of any military law. I said they had no rights there at all.

Q. When was it that Major Van Arsdale said that Judge Noyes had told him that he would make an order in relation to the gold dust that would be satisfactory to everybody?

A. At the same time he rendered his decision, I think he said, "I have received a note from Judge Noyes"—I do not know whether he read it or not, I would not be positive—in which he said, "Judge Noyes tells me that he will make an order which he deems will be satisfactory to everybody," or "will be satisfactory in the premises."

Q. You say you knew that Mr. Knight had made an application to Judge Noyes? Do you know the nature of that application?

A. I saw an order which Mr. Knight had left with Judge Noyes on Sunday. I did not read it. The Judge stated to me that it was a demand that the property should be turned back by McKenzie, or at least an order for him to sign, directing McKenzie to return the property.

Q. You knew that Judge Noyes had declined to make that order, did you not?

A. Yes, sir.

Q. You knew he declined to make it on the ground that the action of the appellate court had deprived him of jurisdiction, did you not?

A. No, sir. He didn't put it upon that ground, but on the ground that the only effect of a supersedeas in the matter of a receivership was to suspend further operations, but not to compel the return of the property, and that was as far as the court could have gone in

making its order, and I think he justified his subsequent action upon that theory.

Q. You know he made an order at that time staying all proceedings under this order of July 23, 1900, do you not?

A. He did not make it then; no, sir.

Q. Did he not make it on the 17th?

A. No, sir.

Q. When did he make it?

A. I have always been told that he made that about the 19th.

Q. Well, possibly on the 19th.

A. He said in open court on Monday, the 17th, at 10 o'clock, after he had disposed of the cases, that he would make an order in this case at 2 o'clock in the afternoon, but he did not make any order in the afternoon at 2 o'clock, and I was afterwards advised that he made the order about the 19th of September, though I am not certain as to the date. I know it was not the 17th.

Q. And, as you understood it, after making that order, this verbal order which had never been filed or entered in the minutes, directing the United States marshal to take possession of the gold dust, still remained in force?

A. I understood the marshal was in charge of that gold dust from the time he took charge of it on the 14th, and if Mr. McKenzie, after the 14th, had attempted to go to that bank, he would not have been permitted to go there.

Q. You understood that that order made by Judge Noyes had no effect upon this order which you say was made and which was never signed and not entered in the minutes?

A. Judge Noyes had made his previous order directing McKenzie to deposit that dust in that vault and leave it there. That was the order of the 24th of August. I understood that the order had been made afterwards to the marshal, the court recognizing that that dust was in the possession of and under his control. The order withdrawing it from the possession of McKenzie was made, as I understood at the time, for the purpose of satisfying these defendants that McKenzie would not have access to it or be able to remove it; and Judge Noyes made the order to further that, as I understood.

Q. Are you familiar with the fact that an order was made in this language on the 17th of September: "Ordered that all further proceedings herein in relation to said interlocutory order of said 23d day of July, 1900, of this district court be, and they are hereby, stayed, pending said appeal from said interlocutory order to said circuit court of appeals"?

A. I know there was an order of that kind, but I have always understood that it was not made until the 19th of September. Monday was the 17th of September, and my understanding is that he did not make any order on the 17th, but promised to do so. Is that marked "filed"?

Q. Yes. That was filed on the 17th of September, it appears here.

A. I have always understood that that order was not in fact filed until the 19th. I do not know; it was not certified. But I do not consider that that order in anywise affected or modified the other order, because the marshal's order was intended to preserve the property, and prevent its removal or alteration.

Q. Was it after or before the 17th of September that Judge Noyes told you that these orders were not appealable, and that the writ of the circuit court of appeals was void?

A. I saw Judge Noyes on the 16th, Sunday, at his rooms, and he called my attention to the orders which Mr. Knight had left there; I think they were lying on the window-sill. Mr. Knight, I think, had been there the night before, Saturday night, and again that day. And he said that he was then preparing an order which he thought would be the proper order. Then we had some discussion about the effect of the appeal, and Judge Noyes thought that under the decisions we had there that an appeal would not lie from an order appointing a receiver, and then said that even if such an order was appealable, that the only effect of the supersedeas, under the Goddard case, would be to stay proceedings, but that it would leave the fund in the hands of the trial court, and it was the duty of the trial court to take the necessary steps to preserve that fund. I always believed that he was strictly following the instructions of the Supreme Court of the United States in doing what he did.

Q. What did he say about the writ of supersedeas? Did he say that the clerk had gone outside of his authority, too?

A. I think we agreed that the writ of supersedeas that was there, containing provisions directing us to turn over personal property, was in excess of the authority of the clerk, because the clerk's order could not be any broader or contain any provisions other than those contained in the order of Judge Morrow.

Q. After this second order made by this court reached Nome, did Judge Noyes do anything, so far as you were advised, to undo his action directing the marshal to take possession of this fund?

A. I don't think I had any talk with the Judge about it. The thing was done and over with, and that was about all there was to it.

Q. Did you understand, when the marshals from San Francisco reached Nome, that that fund was still in the possession of the United States marshal for Nome?

A. I understood that the fund was in such a condition that we could not have access to it.

Q. Did you ever advise Mr. Burnham that that fund was in the possession of the United States marshal, or in anywise under his control?

A. I don't think I ever had any conversation with Mr. Burnham about his duties, or about his rights, or about what was to be done there. I don't think Mr. Burnham had very much to say. He had the custody of the prisoner, and that was about all he was interested in, apparently.

Q. Do you know of your own knowledge whether Mr. Burnham ever went to the United States marshal for Nome, and received the answer that the marshal had absolutely nothing to — with this gold dust?

A. I know nothing about that. I was not with Mr. Burnham at all. At least, I was with Mr. Burnham in the office, but I was not with him when he went to see the marshal.

Mr. GEARY: That is all the testimony for the prisoner.

Mr. MCCUTCHEN: Do you understand, Mr. Geary, that these affidavits which have been presented and filed here, are to be used by you as part of your defense?

Mr. GEARY: That is what we offered them for. That is why they were offered.

Mr. MCCUTCHEN: Have you a copy, Mr. Geary, of the opinion which you gave to Mr. McKenzie, and which you say you presented to Major Van Arsdale?

Mr. GEARY: I don't think I have a copy of it. I will try and find one. I haven't any here.

Mr. MCCUTCHEN: That might throw some light upon the matter. Have you a press copy of it?

Mr. GEARY: I may have a copy of it, but I am not certain. I had several copies at the time.

Mr. MCCUTCHEN: Mr. Clerk, will you let me have the affidavits of Mr. Vawter and others, filed upon these two applications of ours?

Mr. GEARY: I do not know whether I have copies of them or not. I will look it up, however.

Mr. MCCUTCHEN: We desire to object, if the court please, at this time, to the use of the affidavits of C. L. Vawter, Dr. Cabell Whitehead, and the other affidavits—I think this objection goes to all of them, but, however, it goes to these two, and I will examine the others later to see—we object to these affidavits upon the ground that they are not entitled to this cause nor in any other proceeding, and that an indictment for perjury could not be predicated upon any of them, assuming the statements contained in them to be false. The venue is, there being no title of court or cause and no reference to any court or cause, but the affidavit starting off in each case in this way, "District of Columbia, Washington, D. C." The affidavit to which I refer in stating that is the affidavit of Dr. Whitehead. The affidavit of Vawter has the venue laid as "United States of America, second division, district of Alaska." I understand it to be the well-settled rule that an affidavit cannot be used in a proceeding in which it is not entitled. It was held in the case of Humphrey *vs.* Cande, 2 Cow., 509, that an affidavit wrongly entitled, though the cause be described in the body of the affidavit, cannot be read. In Buerk *vs.* Imhaueser, Fed. Cases, 2107, which is a case from the southern district of New York, it is held that affidavits not entitled in the cause are merely extrajudicial oaths, and are not receivable in court. In the case of Regina *vs.* Christian, reported in 1 Carrington and Marsh, 388,

and the same case, in 41 Eng. Common Law, 214, it was held by Lord Denman that courts are quite right in not receiving affidavits which are not properly entitled. To the same effect are the cases of Hawley *vs.* Donnelly, 8 Paige, 415; Saunders *vs.* Erwin, 2 How. (Miss.), 732; Whipple *vs.* Williams, 1 Mich., 115; Higham *vs.* Hayes, 2 How. Prac., 27. It would be a very dangerous rule, indeed, it seems to us, to permit the use of these affidavits in this proceeding, and particularly dangerous in view of the fact that the man charged with this contempt is here, and those statements, many of them, purport to be made to him, and he does not see fit to take the stand and testify to them. They are rested upon affidavits not entitled in this proceeding, nor in any other proceeding upon which a charge of perjury could be predicated. We insist, therefore, that the affidavits shall not be used.

Mr. GEARY: We think the objection comes too late, if your honors please, if there is anything in the objection at all. These affidavits were offered to your honors last Monday, read by us, and received in evidence without objection. It is an elementary rule that a party must make objection to the form and sufficiency of a paper at the time the same is offered, and not two weeks later. If we had understood that there was to be objection made to these affidavits we could have had Dr. Whitehead here. These affidavits were offered and received, and are in this case. As to the objection about their not being entitled, I do not understand that a contempt matter has any entitling. It is not entitled, as a matter of fact, in the case in which the order is made. It is, as a matter of fact, a criminal proceeding initiated by the court, and stands independent of the case itself. The fact that the contempt arose, I think, does not necessarily attach the title of the case in which it arose. I think an affidavit made and actually used, moreover, may be the subject of an action for perjury, if the statements therein contained are false. If the making of a false oath constitutes perjury, there is perjury, whether the affidavit is entitled or not.

Judge GILBERT: We think the objection should have been taken at the time they were offered. The objection is overruled.

Mr. MCCUTCHEN: We now offer in evidence an affidavit made by Dr. Cabell Whitehead.

Mr. GEARY: Have you a copy of it?

Mr. MCCUTCHEN: Yes, here is a copy of it. I will read it.

Mr. GEARY: Wait a moment until I look it through.

Judge GILBERT: You may read the affidavit, and counsel can make his objection afterwards.

Mr. MCCUTCHEN: The affidavit is entitled in this court and cause. It reads as follows:

"UNITED STATES OF AMERICA, }
City of Washington, District of Columbia, } *ss:*

"Cabell Whitehead, being first duly sworn, deposes and says:

"That he is a resident of the city of Washington, D. C., and that during the summer of 1900, and at various times hereinafter mentioned, was the manager of the Alaska Banking and Safe Deposit Company, a corporation conducting a banking business, having also safe-deposit boxes or vaults, at Nome, Alaska, where he then resided.

"That at different times in the months of July and August, commencing about the time of his arrival at Nome, one Alexander McKenzie rented from said company various safe deposit boxes, in which were shortly thereafter stored, under orders of the district court at Nome made subsequent thereto, large quantities of gold dust extracted, as affiant is credibly informed and therefore believes, principally if not entirely from certain placer mines on Anvil creek near Nome, by or under the direction of said McKenzie as receiver of said mines, known respectively as No. 2 Below Discovery and Nos. 2 and 10 Above, then involved with No. 1 Nakkela Gulch in litigation.

"That from the various times it was so placed in said safe-deposit boxes as aforesaid, and up to the 14th day of September, 1900, said McKenzie and his agent had full and uncontrolled access to said gold, and each and every part thereof, and to said boxes containing the same.

"That on the day last mentioned, serious disturbances having taken place in and about the building of said bank at Nome, caused by said McKenzie's refusal to obey the provisions of certain writs of supersedeas, of the above-entitled court, issued in the litigation before mentioned, which said writs had immediately prior to the time last mentioned arrived at Nome, and, as affiant is informed and believes, been duly served upon said McKenzie and others at said time, and caused also by the determination of the defendants in said litigation claiming said gold dust, that said writs should be obeyed and said dust restored to them, as therein provided, it was then and there agreed and understood by and between affiant, acting on behalf of said bank, said McKenzie as such receiver, and Samuel Knight, acting on behalf of the Wild Goose Mining and Trading Co.—impleaded by amended complaint herein and in the further cases of Tornansis *vs.* Melsing *et al.*, and Nakkela *et al. vs.* Webster, also pending in the above-entitled court, and in which affiant swears to the same facts as are herein set forth—that no part of said gold dust extracted from the claims involved in said cases should be withdrawn from said safe-deposit boxes by said McKenzie, except by the consent of said Knight.

"That in pursuance of said agreement and understanding, in or about the early part of October, 1900, said McKenzie, with the consent of said Knight, withdrew from said safe-deposit boxes and handed affiant gold dust said to have been extracted from said

claims, amounting in value to a sum approximating $10,000 for the purpose of reimbursing said bank for the payment of checks which had been issued on said bank by said McKenzie, and countersigned or vised by a representative of said Wild Goose Mining and Trading Co., for payment of the wages in full of all laboring men, including time-keepers, foremen, shift bosses, and watchmen employed in or about said claims known as No. 2 Below, No. 10 Above. This amount was so used by said bank, except a small balance thereof, somewhat less than $1,000 in value, the money equivalent whereof, at $16 an ounce, being turned over to said Wild Goose Mining and Trading Co. when the officers of the court of appeals enforced its writs on the 15th day of October, 1900.

"That at any or all times during the business hours of the day, not only before but after the arrival at Nome and service of said writs of supersedeas, as aforesaid, and until their enforcement by the officers of the above-entitled court as aforesaid, said McKenzie was in a position to deliver and could have delivered, as far as affiant knows to said Knight or to any one else acting on behalf of the said Wild Goose Mining and Trading Co., with the consent of said Knight, all or any part of the gold dust stored in said safe-deposit boxes and extracted from said claims as aforesaid, to wit, from No. 2 Below and No. 10 Above, and therefore could have obeyed the directions in said writs of supersedeas contained; and although the U. S. marshal of the second division of the district of Alaska showed affiant about the 19th or 20th of September, 1900, a letter purporting to come from Judge Noyes directing the former to protect said gold dust, nevertheless, neither the said marshal nor any of his deputies, nor the commanding officer of the United States troops at Nome, nor any of his officers or soldiers, ever at any time took or assumed any possession or control of or exercised any authority over said gold dust or any part thereof, or took any part herein other or further than to preserve the general peace and order of the community, except that the military authorities, however, assisted the officers of said appellate court at their request in enforcing said writs of supersedeas, when it was ascertained by them that neither the court at Nome nor its officers intended to nor did obey the directions of said appellate court.

"Affiant further deposes that all the times hereinbefore mentioned, he and the officers of the said bank were ready and willing to obey and assist, as far as *they* in his or their power in facilitating the obedience by the proper parties to the writs and orders of the above-entitled court. And further saith not.

CABELL WHITEHEAD."

And it is subscribed and sworn to on the 18th day of January, 1901, before Lyon, notary public.

Mr. GEARY: To that we object, if the court please, because the affidavit does not appear to have been sworn to before any person

authorized to administer an oath. Let me look at the original; I have but a copy of it. Mr. Lyon simply subscribes himself as a notary public, if your honors please, does not say notary public of where, what county, where he gets his authority to be a notary public, and so on.

Mr. McCUTCHEN: Does not the seal say?

Mr. GEARY: Yes, but the seal is not the signature. A seal is only to authenticate a writing. A notary public who subscribes himself should set forth his authority. Mr. Lyon may have been a notary public a year ago and have lost his office. He does not subscribe himself as a notary public of the District of Columbia, or any place, and it strikes me that the paper must show his authority.

Judge GILBERT: What does the seal say?

Mr. McCUTCHEN: The seal shows that he is a notary public for the District of Columbia.

Mr. GEARY: I ask that the seal be read.

Mr. McCUTCHEN: It reads, "Rutherford B. Lyon, notary public, District of Columbia."

Judge GILBERT: We think that is sufficient.

Mr. McCUTCHEN: Will it be admitted, Mr. Geary, that the respondent McKenzie now has in his possession more than $10,000, either in gold dust which came out of claims No. 2 and 10, or the proceeds of gold dust which came out of those claims during his receivership there?

Mr. GEARY: I do not think it is necessary to make the admission. I do not think it is pertinent. He is charged with disobeying a certain writ on a certain day, and the testimony should be confined to that.

Mr. McCUTCHEN: Very well. We will ask Mr. Page to take the stand. Mr. McKenzie is charged here with disobeying a certain writ, and we think this is pertinent to it. As you will not admit it, we will examine Mr. Page.

CHARLES PAGE, called pursuant to order of court, sworn.

Mr. McCUTCHEN:

Q. You are one of the attorneys for the appellants in this case?

A. Yes, sir.

Q. And have been ever since the case has been in this court?

A. Yes, sir.

Q. Do you know Mr. McKenzie, the respondent?

A. I have become acquainted with him since he came down here.

Q. Within the past two or three months?

A. Yes, sir.

Q. Did you ever have any conversation with him in relation to his possession of gold dust which had been taken out of the claims mentioned in this case, or the proceeds of that gold dust?

A. On two occasions, I think, it was referred to.

Q. When was the first occasion?

A. The first occasion was twice on a Sunday, I suppose about a onth ago, as near as I can recollect, when you and I, at the re-uest of Mr. McKenzie, were introduced to him, and then had some nversation with him, in which he requested that we should assist im in getting his accounts settled. He then stated that he had oney——

Mr. GEARY: We object to any statement by Mr. McKenzie made t that time as to the present condition of affairs, as not being per-inent, and as irrelevant and immaterial to the charge of contempt re are brought here to answer. The charge here is the disobedience f a specific writ on a specific date.

Judge GILBERT: This is money he spoke of having at the time he writ was served, is it?

Mr. MCCUTCHEN: This is money supposed to have been in his possession at that time.

Mr. GEARY: We are not charged with having disobeyed the writ on any later date. The charge here shown by the affidavits is that a certain demand was made at a certain time, and we refused to comply with that demand. The testimony in the contempt matter must be confined to the charge made in the affidavits; otherwise the defendant has no opportunity to prepare a defense.

Judge GILBERT: Is this not some part of the money?

Mr. GEARY: We have admitted that we did not turn over anything on that date. So what difference can it make to this court whether we have or have not any part of that now? We admit that they made a broad proposition, that they made a broad demand to turn over all this property, and we decline to turn it over. We leave the case as though we had it all.

Judge GILBERT: You have attempted to make a showing which you claim is a justification.

Mr. GEARY: On the date when these demands were made, we declined to do it; and furthermore, we were in a position where we could not do it. That would not necessarily be changed by our present position. I submit the testimony ought to be confined to the charge made against us of disobedience of the writ upon that date.

Judge GILBERT: We will have to get the facts to determine whether this is in the same category as the rest, or not. The objection is overruled.

Mr. GEARY: The defendant excepts.

The WITNESS (continuing): He then stated that he had money under his control which belonged to the mines represented — us of which he had been receiver. I don't remember now that he stated the exact amount, but the general understanding that we had was that he — quite a large sum of money in his control; that there were certain bills which had not been paid by him, and which he considered to be a claim upon that fund, and then his own claim for his personal services and those of his advisers. Subsequently, in our office and within the last two weeks certainly, Mr. McKenzie

repeated the same thing, and added to it his great desire of having us assist him to get this account of his settled.

Mr. McCUTCHEN:

Q. His accounts as receiver?

A. Yes, sir. He then said that he had this money in his possession, and Mr. Geary has stated to us that he had $13,000 in his possession. He named the figure.

Q. The proceeds of the gold dust received by him while he was receiver of those claims?

A. Yes, sir, against which he told us that there were claims for about $1,800 not yet paid, outside of the receiver's personal services and the receiver's attorneys' services.

Cross-examination—Mr. GEARY:

Q. In this conversation, Mr. McKenzie told you that he wanted his accounts settled and adjusted, and was willing to pay over whatever balance appeared after the settlement of these accounts, did he not?

A. Yes, sir.

Mr. McCUTCHEN:

Q. Including his commissions?

A. Yes, sir.

Q. And attorneys' fees?

A. Yes, sir, a settlement of all his accounts.

Mr. GEARY:

Q. The result of the conversation was, that he asked you if you would not take up the matter of the accounts, adjust them and settle them, and he was ready to pay over whatever balance appeared to be due after the settlement of the accounts. Is that not correct?

A. Yes, sir.

Q. And he would then stipulate that the balance of the fund, after the settlement, might be sent to Alaska, so there would be no necessity of his returning there?

A. Yes, sir.

Q. About the $13,000. We were discussing the probable amount, were we not?

A. Yes, sir.

Q. You said you thought it was one sum, and I said I had a general idea that it might be larger than that?

A. Yes, sir.

Q. But in that conversation, did I not tell you that I had not any certain knowledge of the amount, and that my figures must not be accepted as correct?

A. I said I thought it was between $9,000 and $10,000, or $11,000, and you told me that you thought it was more, and went as high as $13,000.

Q. I told you at that time that the figures must not be accepted as correct did I not? That I had no exact knowledge of the amount?

A. I don't remember your language. But I should certainly not have held you to the correctness of the statement.

Q. Did I not tell you yesterday, in a conversation with you, that the amount that I had given must not be accepted as correct, because I was only speculating, and had no exact knowledge, the same as you?

A. I don't remember. But certainly the impression is in my mind that I could not hold you to those exact figures.

Mr. McCUTCHEN: We will call Mr. Knight.

Judge GILBERT: This witness will take some time, I presume?

Mr. McCUTCHEN: I think so, yes, your honor.

Judge GILBERT: Then we will take a recess until 2 o'clock.

(A recess was here taken until 2 o'clock p. m.)

Afternoon session.

GEORGE H. BURNHAM, called pursuant to order of court, sworn.

Mr. McCUTCHEN:

Q. Mr. Burnham, you are a deputy United States marshal for the northern district of California?

A. Yes, sir.

Q. How long have you occupied that position?

A. Since the first of June, 1899.

Q. Were you one of the deputies who went from here to Nome to enforce the order of this court in the case of Rodgers *vs.* Kjellman?

A. Yes, sir.

Q. And in the case of Melsing *vs.* Tornanses?

A. Yes, sir.

Q. Were you accompanied by any other deputy?

A. Yes, sir.

Q. Who was the other deputy?

A. Mr. S. P. Monckton.

Q. Mr. Monckton has died since that time, has he?

A. Yes, sir.

Q. When did you arrive in Nome?

A. On Monday, October 15, 1900.

Q. When you arrived there, did you see Mr. McKenzie, who had been appointed receiver in those cases?

A. Yes, sir.

Q. How soon after your arrival did you see him?

A. Oh, I think about an hour and a half; maybe two hours.

Q. Did you make any demand upon him for the return or delivery to you of the gold dust which had been taken from the claims mentioned in the pleadings in this case?

A. Well, I will say yes to the question, and then I would like to make an explanation about it.

Q. Proceed and make your explanation.

A. We had an order in this case that directed the marshal to proceed to Nome and execute a writ of supersedeas that had theretofore been made in the case, and in addition to that to arrest Mr. McKenzie and produce him before this circuit court of appeals on the 5th day of November, 1900. We served the order upon Mr. McKenzie at the Golden Gate hotel in Nome City on the 15th of October, 1900, I think about 9 o'clock. We told Mr. McKenzie that we had an order from the circuit court of appeals of this circuit that required us to take him into custody and produce him before the court on the 5th of November, 1900, and that in addition to that, the order required us to execute a writ of supersedeas that had been theretofore executed in the case, and that we would have to have the gold dust that was in his possession.

Q. What did he say in answer to that?

A. Mr. McKenzie said that he would waive the reading of the papers, and that he would willingly come to San Francisco, and asked us to take him before his attorney, or to his attorney's office.

Q. Did you do so?

A. Yes, sir.

Q. Did you have any further conversation with Mr. McKenzie before taking him to his attorney's office?

A. No, sir.

Q. After you took him to his attorney's office, what conversation, if any, did you have with him, or with his attorney in his presence?

A. We never, at least I never, had any conversation with Mr. Geary. My recollection is that Mr. Monckton handed Mr. Geary the papers upon which we had made the arrest; I did not do that; Mr. Monckton did that. But I was talking with Mr. McKenzie pretty much the whole day; that is, at different times during the whole day.

Q. Did you say anything to Mr. McKenzie about the keys to the vaults in which the gold dust was placed?

A. Yes, sir.

Q. What did you say to him about the keys?

A. About as near as I can recollect, at noon, or about 1 o'clock on that day, Mr. Monckton and myself had Mr. McKenzie in Judge Geary's office, and we asked Mr. McKenzie if he had the keys to the boxes in the vault of the Alaska Safe Deposit and Banking Company, I believe it is called, in which the gold dust was deposited that was to his credit, that had been taken from the different mining claims on Anvil creek. He said he did not have the keys, that he had turned them over to Mr. Wood, who was the United States attorney for that district, and that he thought the keys were safer in Mr. Wood's possession than in his own, and for that reason that he had turned the keys over to Mr. Wood. Just about that particular minute, Mr. Wood came into the room, and Mr. Monckton said to

him, "Mr. Wood, do we understand that you have the keys to the boxes in the vault that contains the dust that has been deposited in those boxes to the credit of Mr. McKenzie as receiver?" Mr. Wood said he did not know whether he had the keys or not. He repeated the question, and he said, "I don't understand anything about it." Then Mr. Monckton said that Mr. McKenzie had just told him that he, Mr. Wood, had the keys, "that he gave you the keys to the boxes, and I now make a demand for those keys." Mr. McKenzie then said, "Yes, Mr. Wood, I told the marshals that I had given you the keys; that I considered the keys were safer in your possession than in mine." Then Mr. Monckton said, "Then, Mr. Wood, I presume you have the keys?" Mr. Wood said, "I don't know whether I have them or not," and got up to go, and said, "I will see you later."

Q. In that conversation, did McKenzie say to Wood to turn the keys over to you?

A. No, sir, I don't think so.

Q. Did McKenzie state to you or to Mr. Monckton at that time that the gold dust was in the possession of the United States marshal for Nome?

A. No, sir.

Q. Did he ever state that to you?

A. He never stated it to me. He said this: That the reason that he did not obey the writ of supersedeas that had been executed by this court before was that Judge Noyes, of the district court of Alaska, had made an order that forbade him from going to the vaults, and that he could not get the dust himself.

Q. In that conversation did you have any talk with McKenzie about any other money that he had received as receiver? That is, money other than the dust that was in the vault?

A. I don't think so; not then; not at that time.

Q. Well, at any time subsequent to that, and while you were at Nome, did you say anything to him about some gold dust that came from Nakkela?

A. Oh, yes. I don't know whether that was in Nome or on the steamer coming down. I think I said something to Mr. McKenzie on the steamer about that. I asked Mr. McKenzie if he had any dust in his possession that came from the Nakeli claim No. 1, or No. 1 on Nakeli, whatever the term was, and he said yes, he did, that he had something in the neighborhood of, I think he said, $288, or that he had had that dust, but that he had converted it into money and had paid some bills that were against the claims, and that he had vouchers for it.

Q. Did he say two hundred and eighty-eight dollars or two hundred and eighty-eight ounces?

A. Two hundred and eighty-eight dollars; I think eighteen or nineteen ounces.

Q. Do you remember whether you asked him if he had any gold dust, or the proceeds of any gold dust, outside of and in addition to the gold dust in the vaults in the bank?

A. I think I did.
Q. Do you remember when you asked him that?
A. Well, I don't recollect just the date, but——
Q. (Interrupting.) Was it while you were in Nome?
A. Yes, sir, it was while we were in Nome.
Q. Do you remember his reply to that?
A. He said he didn't have anything more.
Q. Did you make a return in that proceeding?
A. Yes, sir.
Q. Have you filed it here?
A. Yes, sir.

Mr. McCUTCHEN: We offer this return in evidence, if your honors please.

Mr. GEARY: And consider it as read?

Mr. McCUTCHEN: Yes, it may be considered as read, if your honors please.

Q. How did you get the money out of the vaults, Mr. Burnham?

Mr. GEARY: That is, if you know yourself?

A. I was not there. I only know what Mr. Monckton told me that night. I know what he told me that night, and I know how we were to get the money out of the vaults, because Mr. Monckton and I talked that matter over during the day. After we made the demand on Mr. McKenzie for the keys, and he said he didn't have them, and we made the further demand on Mr. Wood for the keys, and he did not produce them, Mr. Monckton and I had a little conversation between ourselves, and I know what we agreed to do then.
Q. Did you ever get the keys?
A. No, sir, I never did.
Q. Did Mr. Monckton ever receive the keys, to your knowledge?
A. No, sir, not to my knowledge.

Mr. McCUTCHEN: Take the witness.
Mr. GEARY: That is all.

SAMUEL KNIGHT, called pursuant to order of court, sworn.

Mr. McCUTCHEN:

Q. You are one of the attorneys for the appellants in these two cases of Kjellmann *vs.* Rodgers and Tornanses *vs.* Melsing?
A. I am.
Q. And have been ever since the institution of these suits?
A. I have been, yes.
Q. Where were you in September and October, 1900?
A. In Nome, Alaska, until the 20th day of October last.
Q. Were you there during the whole of the month of September?
A. I was.

Q. Do you remember the circumstances of the arrival in Nome of some papers that had been issued by this court in those cases?

A. I do.

Q. Your affidavit filed here states that you filed in the office of the clerk of the lower court on the 14th of September the citation and certified copies of several papers which are detailed in the affidavit?

A. On the 14th of September I filed the original citation and original writ of supersedeas, with, I believe, a certified copy of the writ, and certified copies of petition for appeal, order allowing appeal, and directing the issuance of a writ of supersedeas, certified copy of assignment of errors, certified copy, I believe, of bond on appeal also, and for the writ of supersedeas.

Q. After filing those papers, did you make any demand upon Mr. McKenzie?

A. On the 15th of September—or rather, I should say, before that, on the 14th of September, I caused to be served on Mr. McKenzie, in addition to a certified copy of the writ of supersedeas, a written demand for the return of the gold dust in accordance with the writ, designating Mr. Theo. Allen as the officer or agent of the corporation to whom such return of the property should be made. On the 15th, the following day, Mr. Allen and myself called on Mr. McKenzie at his office on Steadman avenue, and asked him whether or not he proposed to return the property under the writ.

Q. What did he say?

A. Mr. McKenzie said that he desired to consult his attorney. I told him that I called for two purposes, in the first place, to determine whether or not he would return the property under the writ, and also to introduce to him Mr. Allen, who was named in the written demand, to identify him as being the same person who was entitled to receive the property on behalf of the Wild Goose Mining and Trading Company. Mr. McKenzie said he would be governed by the advice of his counsel, and would, as I recollect it said, that he would decline to return the property unless his counsel advised him so to do—words to that effect, that he would be governed by his counsel.

Q. At what time was that on the 15th of September?

A. My impression is that that was in the latter part of the forenoon or the early part of the afternoon of the 15th of September.

Q. Did you have any meeting after that time with Mr. McKenzie or anybody representing Mr. McKenzie, in relation to the matter about which you had previously interviewed him?

A. With reference to the return of the property?

Q. Yes.

A. I do not recall any further interview with Mr. McKenzie after the 15th of September, in which I myself took part and in which I demanded the restitution of the property.

Q. Did you have any interview with the attorney for Mr. McKenzie, at a meeting at which Major Van Arsdale was present?

A. Yes, sir. We had a meeting with Major Van Arsdale, and I stated particularly the date in my affidavit—I think it was about Sunday, the Sunday following. We had made an application to Major Van Arsdale for military assistance, and Major Van Arsdale said that he thought all parties should be represented. So I understand that word was sent to Mr. Geary and to others, and a little later in the evening there was a gathering in the headquarters of Major Van Arsdale, or rather in Captain French's headquarters, Major Van Arsdale having come up from Nome river on that morning. We stated that we desired to have the assistance of the military forces there, in order that the writs might be carried out. A number of different arguments were made by different counsel who were present, most of the counsel, I think, engaged in this Anvil Creek litigation being present, and the result was that Major Van Arsdale said, "I will take this matter under advisement, and meanwhile Captain French and myself will see Judge Noyes and will let you gentlemen know later in the day what the position of the military will be." Later in the day Major Van Arsdale said, we having returned there at some appointed hour, that he and Captain French had seen Judge Noyes, and that Judge Noyes had stated that he would make an order which would be proper in the matter, and Major Van Arsdale furthermore said that, "Since Judge Noyes has said so, it is only right that the military shall wait to see what shall be Judge Noyes' order. If he says he will make such order as is proper, we must presume that such will be made. Therefore the matter will have to remain in abeyance."

Q. Did he say what kind of an order Judge Noyes had said he would make?

A. No, sir. He did not specify the character of order that Judge Noyes would make; simply said that Judge Noyes had stated to Captain French and himself that he would make an order in the matter.

Q. Had you seen Judge Noyes about the matter before that meeting at Major Van Arsdale's headquarters?

A. I saw Judge Noyes for the first time in relation to this particular matter on the evening of the 14th of September, the day the writs arrived at Nome. Judge Noyes was in bed. I went to see him. It must have been about 8 o'clock or so in the evening. The judge stated that he was not feeling well. I commiserated with him. I then said I presumed he knew of the arrival of these writs, because I had directed a copy of the writs to be served upon him. The two or three copies of the writs in my cases were on the little stand by the head of his bed. He said, "Yes, I have received the writs. I have worried very much about all of this litigation, and now the circuit court of appeals has taken this matter out of my hands. I have got no further jurisdiction in the matter." And he said, "You gentlemen have got to fight this thing out among yourselves." I said, "Judge, it seems to me it would be a very appropriate thing for you to make an order in each of the three cases in which I rep

resent the defendants, directing the enforcement of the writ in each case." He said, "Mr. Knight, I can make no order whatever. The matter is out of my hands." And he put his hands up against the back of his bed this way (showing), and he said, "I have nothing further to do about this. You have got to fight it out among yourselves." I said, "Judge, I would like to get this order made." He said, "No, I don't think I could make the order." I said, "Very well;" that if he felt that way, I would not trouble him any further that evening. I called again the following night, the night of the 15th of September. Judge Noyes was sitting up then, and said he had had a conversation with Mr. McKenzie during the afternoon, and he said, "I have come to the conclusion that your papers have been very hastily drawn. The order is not appealable, and you have taken"—as he used the expression—"a very suspicious advantage of the injunctional part of that order." I said, "Judge Noyes, you could not have a record presented to you prepared in a more hasty manner than the record upon which you appointed the receiver in these cases, and I do not think it is for you to criticise the character or any alleged business now in these papers." Mrs. Noyes present at the time, and I saw that possibly there might be a little feeling engendered, and said nothing further. And he said, "We will not discuss that matter, for you are not entitled to an appeal." I said, "The court below and ourselves take an entirely different view of this matter. We have a writ here now, and we would like to have you enforce it. I have prepared a form of order that I spoke to you about last night, and here is the order," and I then presented him an order which followed very largely the wording of the writ of supersedeas. The judge said, "I cannot sign that order now." I said, "Won't you look it through?" "Well," he said, "I am having an order prepared which will carry into effect what I deem to be the proper order for the court to make." I said, "Will it call for the performance on the part of the officers of this court of the writ?" He said, "Well, it is such an order as I think should be made." I said, "Won't you read the orders which I have prepared?" and he said, "That is substantially what I shall order." I said, "Won't you sign these orders?" "No," he said. "I am having my own orders prepared, and I will sign those orders, but I can't tell you just what I shall do with this particular thing." "Perhaps," he said, "they may be proper, but I think I shall sign my own orders." I said, "At least I will leave these orders with you, Judge, because you may find that they will carry out the provisions of the writ as well as the orders which have been prepared for you." He said, "Very well. You may leave them." I left them on his table in his sitting-room at the Golden Gate hotel that night, about 9 o'clock in the evening.

Q. Did he tell you at that time that he had made any order or given any direction to the marshal?

Mr. GEARY: To that we shall have to object as incompetent. None of these declarations were made in the presence of the prisoner, and they are not testimony.

Judge GILBERT: Are you calling in question the fact of the order having been made at all?

Mr. McCUTCHEN: Yes, your honor, we are. Here was an application made to the judge of the court to make a particular order, and he said he was preparing an order which he would make, and he afterwards made an order.

Judge GILBERT: The witness may answer the question.

The WITNESS: What is the question, Mr. Reporter:

(The reporter reads the question as follows: "Did he tell you at that time that he had made any order or given any direction to the marshal?")

A. Yes, sir. Either an order or a direction of some kind.

Mr. McCUTCHEN:

Q. When did you hear of that?

A. Shortly after the disturbance in the bank building of the 14th of September. It must have been a few days after that time. The marshal came into the assaying-room, which is directly back of the bank building, or rather, it was not directly back of the bank building, but directly back of the banking office in the building, in a part of the same building. They beckoned me to come in there; I was outside. The marshal said——

Mr. GEARY (interrupting): We must object to this. We were not present at that time. This is the marshal's declaration, and I don't know what it is.

Mr. McCUTCHEN: You have presented the affidavit of the marshal, and we are entitled to contradict it. We could not cross-examine him upon the affidavit, and so we must take this means of contradicting him.

Judge GILBERT: Proceed.

A. The marshal said, "I have received a direction from the judge to take charge of the gold dust. I want to know in what position I am situated." He turned to me and I replied, "If that is the case, if you have an order of the judge, he evidently intends you to take charge of the dust." He rejoined to that, "I don't care to mix up this matter, and I don't want to have anything whatever to do with it."

Mr. McCUTCHEN:

Q. Before we get to that, and before we proceed further with that. You say that you prepared an order and presented it to Judge Noyes for his signature?

A. I did.

Q. What was that order?

A. That order provided, as I recall its terms, for the return of the gold dust to the defendants, the return, including, I think, all of the

property, the real as well as the personal property—the gold dust and other personal property.

Q. Do you know whether Judge Noyes did afterwards make an order in these cases?

A. He did.

Q. What order did he make?

A. On the night of the 17th of September and after the usual closing hours of the court, that is, after about 5 o'clock, some time in the early evening, an order was placed on file directing a stay of proceedings.

Q. That was on the 17th of September, you say?

A. On the 17th of September, I think.

Q. Did you ever see any other order made by Judge Noyes in these two cases, after the service and filing by you of the papers which you have mentioned?

A. Not with relation to either the carrying into effect of the writ of supersedeas, or relating to a stay. There may have been orders—portions of the case.

Q. Was an order for the payment of some men made—a stipulation?

A. Yes, sir, that order was made.

Q. Did you ever see any order directing the marshal to do anything in relation to this gold dust?

A. I did not.

Q. Do you know, from any examination which you made of the files or minutes, whether there was any such order on file or any such order in the minutes?

A. I examined the files and examined also the minutes not very long before I left Nome, and found no such order in either place.

Q. I show you an order, or what purports to be an order, found on pages 130, 131 and 132 of the record in the case of Kjellmann *vs.* Rogers, and I ask you whether that is the order staying proceedings to which you have referred?

A. (After examining paper:) That is the order to which I have just referred.

Q. I understand you to say that that is the only order which you ever saw, either on file or in the minutes, pertaining to this matter, after the arrival of these papers in Nome.

A. It is.

Mr. McCUTCHEN: We offer this order in evidence, if your honors please.

Mr. GEARY: It may be considered read.

Mr. McCUTCHEN: Counsel says it may be considered read. It is to be found on pages 130, 131 and 132 of the printed record.

Q. At any time after those papers arrived in Nome, did you have any conversation with Mr. Vawter, the United States marshal, in relation to their enforcement?

A. I did.

Q. When?

A. On the afternoon of the 14th of September I called upon Mr. Vawter with Mr. Shelley P. Monckton, deputy United States marshal——

Q. (Interrupting.) Mr. Knight, I am now asking you whether, upon the arrival of the writ of supersedeas, you had any conversation with Mr. Vawter in relation to the execution of that writ?

A. I did.

Q. When did you have that conversation?

A. I believe it was on the afternoon of the 14th of September.

Q. Did you have any conversation with him upon that subject at any other time?

A. I don't recall any conversation between the time when I had the conversation with him on the 14th of September in which we requested him to enforce the writ, and the conversation I had with him on the 15th of October, with Mr. Monckton.

Q. Detail the conversation which you had with him in the presence of Mr. Monckton on the 15th of October.

Mr. GEARY: That is objected to as incompetent and not in the presence of this prisoner.

Judge GILBERT: You wish to throw some light on the affidavit made by the marshal?

Mr. MCCUTCHEN: Certainly, you honor.

Judge GILBERT: Proceed.

A. On the afternoon of the 15th of October, I took Mr. Shelley Monckton to the office of the marshal, went into his back room, introduced Mr. Monckton to the marshal, and stated that, as the marshal of the Nome district was the executive officer of the court, I thought it only proper that Mr. Monckton, who represented the United States marshal of California, should meet and co-operate with him in carrying into effect the orders which Mr. Monckton had received. The marshal said, "You know I have nothing to do with this matter, and desire to keep out of it. If any assistance is necessary, Mr. Monckton, the officers of the northern district of California are as well able to call upon additional assistance as I am, and I do not want to have anything further to do with it." I said, "Mr. Vawter, of course I have known that has been your position throughout this litigation. It is a matter of courtesy that I have brought Mr. Monckton here to you, if it should be productive of no other results." He said, "I appreciate your courtesy, but you know I do not care to have anything to do with this matter."

Mr. MCCUTCHEN:

Q. Did he say anything at that time about these papers not being directed to him?

A. He did. At the earlier interview of the 14th of September he said, "The writs are not directed to me, and therefore I do not conceive it to be my duty to execute them." He said, "If they were

directed to me specifically, the case might be different." I do not recall that he used similar language in the second interview. He said in the second interview that he did not consider that he had any part to play.

Q. Did he say at that time that he was in possession of the gold dust?

A. He did not.

Q. Coming back now to the meeting at Major Van Arsdale's headquarters. What, if anything, was the reason assigned at that meeting for the failure or refusal of Mr. McKenzie to obey the writ of supersedeas?

A. Mr. Geary stated that in his opinion the order, in the first place, was not an appealable order, that the appeal had not been properly taken; that the writ in his opinion went beyond the order directing the issuance of the writ. My impression is that he also mentioned that in one of the cases there was no order on file showing that the court or a justice of the court had directed any writ to issue; that there was simply the writ itself. I think those were the principal grounds which Mr. Geary took before Major Van Arsdale against the application made to Major Van Arsdale for assistance.

Q. Did you ever go to the—by the way, what is the name of this banking institution where these vaults were?

A. The Alaska Banking and Safe Deposit Company.

Q. Did you ever go to the vaults of that institution with Mr. McKenzie?

A. I met Mr. McKenzie in that institution in the early part of October, at one particular time, I recall.

Q. Did you meet him there by appointment?

A. By appointment.

Q. Just tell the court how the appointment happened to be made, and what you did when you got there.

A. The appointment was made through or by Dr. Whitehead, the manager of the bank. Dr. Whitehead had previously informed me that he had told Mr. Lane, or desired to assure Mr. Lane——

Mr. GEARY (interrupting): We object to Dr. Whitehead's declarations.

Mr. MCCUTCHEN: He calls for it in his affidavits, if your honors please.

Mr. GEARY: You asked him if he went there with Mr. McKenzie, and he is now proceeding to state some conversation that he himeelf had with Dr. Whitehead at some time previous. What was done after he got there is pertinent, but this is not.

Judge GILBERT: The objection is sustained.

Mr. MCCUTCHEN:

Q. Just state what took place after you and Mr. McKenzie met there.

A. After we met in the building of the bank, Dr. Whitehead and

Mr. McKenzie and myself, Mr. Freeman, a clerk of the bank—the bank's clerks were generally present, I think—Mr. McKenzie stated that he would take from the—I have forgotten whether it was Mr. McKenzie or Dr. Whitehead said we were there for the purpose of taking from the vaults of the bank, or rather the safe-deposit boxes in the vaults in the bank, a sufficient amount of gold dust to cover the checks which the bank had made out in settlement of claims for wages of shift bosses, time-keepers, laborers, and foremen on claims 2 Below and 10 Above on Anvil creek. I stated that I had orally stipulated, and I think had later stipulated in writing, that that money should be withdrawn, and that, in accordance with the arrangement made with Dr. Whitehead, I was present to give my consent that the money should be withdrawn, and I was going into the vaults with Mr. McKenzie. Mr. McKenzie said he preferred to go in alone. I said, "I can't see any objection to my going in also, as we are equally interested in the disposition of that money." We had quite a little argument over the matter, and finally Dr. Whitehead said, "Well, I will have Mr. Freeman go in, too, and you can absolutely rely upon Mr. Freeman. We will not let a little matter of procedure stand in the way of getting the money out from the vaults to pay these claims." I said that if I was present, represented by some one in whom I had confidence, I was perfectly willing not to go in myself, but to let him go in. Mr. McKenzie said he did not desire me to go in, because he did not want me to know what the numbers of the boxes were in which the dust was contained. So Mr. McKenzie and Mr. Freeman went in, and they came back shortly with gold dust approximating a little over $9,000, between $9,000 and $10,000, in value. That was handed to Dr. Whitehead in my presence, and use- to settle the payments the bank had made on these labor accounts.

Q. You say Mr. McKenzie stated to you at that time that he did not want you to go into the vaults, because he did not want you to know the numbers of the boxes in which the dust was contained?

A. He did.

Q. Was the marshal there then?

A. I don't recollect that the marshal was present.

Q. At any rate, the marshal did not go in and get the gold dust?

A. The marshal did not go in and get the gold dust. No marshal, or any representative of the marshal, took any part in the proceeding.

Q. Did Dr. Whitehead demand from Mr. McKenzie at that time that he produce an order from the marshal before he would allow him to take that dust?

A. I do not recall any such conversation or any such demand. There might have been conversation between Dr. Whitehead and Mr. McKenzie that I did not hear. Whatever conversation there was of that character, if any, was not in my hearing; no such demand was made in my hearing.

Q. Nothing was said in your hearing about this gold dust being taken under an order of the marshal?

A. Nothing that I can recall; no such conversation.

Q. Do you know of your own knowledge whether Mr. McKenzie had any gold dust deposited at any other place in Nome than in the vaults of this banking company?

A. Not of my own knowledge.

Cross-examination—Mr. GEARY:

Q. Mr. Friedman went in with Mr. McKenzie at that time, did he not?

A. Mr. Friedman did, yes, sir.

Q. At that time your contention was that Mr. McKenzie had no authority to go to that vault alone and handle that dust, was it not?

A. Not without my consent.

Q. So that if Mr. McKenzie had gone to that vault on that occasion, not having previously received your consent, he would not have been admitted to the vault?

A. That was my understanding with Dr. Whitehead.

Q. You do not know of any conversation had between Dr. Whitehead and the marshal in the morning, do you?

A. I do not. I was not present at any such conversation.

Q. Did you hear that Mr. McKenzie had attempted to go to the bank vaults in the forenoon, and had been stopped by Dr. Whitehead until you came?

A. I can tell you what Dr. Whitehead told me.

Q. I ask you if you heard of any such thing?

A. I heard that Mr. McKenzie went to the bank at about 11 o'clock in the forenoon, and that Dr. Whitehead had declined to allow him to have access to the vaults, as I was not present.

Q. Dr. Whitehead told you that himself?

A. He told me that himself.

Q. What was done? You said that Mr. McKenzie took out of the bank some gold dust, approximating about $9,000 in value. You mean that he brought out of the vaults pokes with dust in them?

A. Yes, sir, pokes with gold dust in them.

Mr. GEARY: Your honors understand, I presume, that a poke is a purse or bag?

The WITNESS: A bag; quite a long bag that contained about $10,000 in gold dust.

Mr. GEARY:

Q. He brought out one of those pokes, Dr. Whitehead weighed out of that poke or bag sufficient dust to pay the debt. Is that right?

A. Yes, sir, that is right.

Q. Then what was done with the rest of the dust remaining in the poke?

A. My impression is that there was some balance left in the poke, and that was restored.

Q. The poke was taken back again into the vault, and the vault closed?

A. Yes, sir.

Q. At the time we were before Major Van Arsdale, Mr. Knight, no particular case was specified in that discussion, was there?

A. I believe not, Mr. Geary. I don't think any particular case was specified.

Q. You and the attorneys in Chipps *vs.* Lindeberg and in Comptois *vs.* Anderson, all united in the request to the United States soldiers to permit you to enter the vaults. Is that correct?

A. The application was two-fold, Mr. Geary. The application was made, the defendants not acting together necessarily by any common concert in making the application, some of us desiring that the military should assist in enforcing the orders of the court of appeals, and others that if they declined to assist, they would at least withdraw or would not prevent the enforcement on the part of the defendants or some of the defendants themselves of the writs.

Q. And at that meeting, the matters of the application were discussed as one application for the benefit of all the parties?

A. Practically bunched together, you may say.

Q. The Chipps case and the Comptois case and the two Lane cases. That is it, is it not, Mr. Knight?

A. That is practically it; that is, that the military should take some hand in the matter.

Q. Speaking about the orders you took to Judge Noyes: You have offered in evidence the order which he signed on the 17th of September, which was merely an order directing a stay of proceedings in relation to the receiverships in these two cases. The order you presented contained provisions in addition to those directing Mr. McKenzie specifically to return the dust, did it not?

A. Yes, sir, as I remember.

Q. And that order Judge Noyes declined to sign?

A. That order Judge Noyes declined to sign; he did not sign it.

Q. And told you he would not?

A. Practically the last conversation that he had with me was this, upon that, I said: "Judge, if you will read these orders, you may find that they will practically carry out the terms of the writ, and be as effective as the order you propose to draw." He said, "Well, they may be; it may or it may not answer," or something of that sort. He did not tell me then that he would decline, but he did decline, because he made other orders.

Q. Practically his order was made by eliminating from your order a provision directing Mr. McKenzie to act?

A. No, sir. His recital was different.

Q. That was the practical effect, was it not, to eliminate from your proposed order a command to Mr. McKenzie to go and turn over the dust?

A. Well, there were several points of difference. That was one of them. He eliminated all directions to any officer of the court to act.

Q. You never had but one conversation with Mr. McKenzie in reference to the demand, did you, and that on the 14th of September? Is that not the fact?

A. I only distinctly recall the one conversation on that particular point that I had with Mr. McKenzie on the 15th of September.

Q. The 14th or the 15th?

A. I recall the particular conversation on the 15th of September

Q. But you made your formal demand on the 14th, did you not?

A. I made a demand on the 14th. We made two demands, an oral demand and a written demand. The written demand we backed up by an oral demand. That is, the oral demand was made by me on the 15th of September, in addition to the written demand that had been made the day before.

Q. Your written demand on the 14th of September was made prior to the filing of the appeal papers, was it not?

A. When the chief deputy marshal was serving the papers, I was filing them in the office of the clerk.

Q. But the papers were served on McKenzie, or the demand made on McKenzie, before you had attempted to perfect your appeal in the clerk's office?

A. The demand was made on him after I had filed my papers, because the second demand was made after I had perfected my appeal.

Q. I am talking about your first demand. That was made before you took the papers to the clerk's office?

A. About the time McKenzie was being served with the writ, the demand and a copy of the writ of supersedeas, I was filing the original papers, because I remember, Mr. Geary, debating in my mind for a moment whether I should wait and get the return of the officer on the papers I was to file, or would file the papers and then get the return and affidavit of the officer, and I determined not to wait but to file them immediately.

Q. Is it not a fact that the writ of supersedeas came ashore first, and that later in the day you received the appeal papers?

A. The papers all came together.

Q. In the same box?

A. In the same bundle; there were three or four bundles together.

Redirect examination—Mr. McCUTCHEN:

Q. At this meeting at the military headquarters, did you hear Major Van Arsdale make any statement to the effect that the military was acting in subordination to the United States marshal?

A. I heard Major Van Arsdale make a statement to the effect that the military were acting—he did, I believe, make a statement substantially to that effect.

Q. Did he say anything about breach of the peace having been committed?

A. I do not recall very distinctly what Major Van Arsdale did say with reference to that matter; not distinctly enough to testify.

Recross-examination—Mr. GEARY:

Q. Do you remember Major French interrupting Major Van Arsdale with the statement that the marshal desired some more soldiers—at the last hearing in the evening?

A. No, I don't recall it.

Q. And that Major Van Arsdale answered that he would have to wait until he disposed of this matter; that he guessed there would not be any harm done?

A. I don't recall that, Mr. Geary.

Mr. MCCUTCHEN:

Q. By the way, Mr. Knight, in your conversation with Judge Noyes, did he tell you whether or not Mr. McKenzie had been to see him?

A. He told me in my conversation with him on the evening of the 15th of September, that he had seen Mr. McKenzie that afternoon.

Mr. MCCUTCHEN: That is all the testimony we have to offer, if your honors please.

Mr. GEARY: I understood, at least my recollection is, that all the records on appeal that were filed with the district court of Alaska were considered as read at the last hearing. If not, I will ask leave to offer them now, and consider them as read.

Judge GILBERT: They will be considered as read.

Mr. GEARY: That is all, your honors.

(Endorsed:) Nos. 636 and 634. In the United States circuit court of appeals for the ninth circuit. William A. Kjellmann, appellant, *vs.* Henry Rodgers *et al.* John I. Tornanses, appellant, *vs.* L. F. Melsing *et al.* In the matter of the alleged contempt of Alexander McKenzie in having, it is said, disobeyed and refused to comply with the terms of the writs of supersedeas duly issued herein. Monday, January 28, 1901. Testimony and affidavits. Present: Hon. William B. Gilbert, Hon. Erskine M. Ross, Hon. William W. Morrow, circuit judges. Filed January 31, 1901. F. D. Monckton, clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

JOHN I. TORNANSES, Appellant,
vs.
L. F. MELSING ET AL.

and

WILLIAM A. KJELLMAN, Appellant,
vs.
HENRY ROGERS.

Nos. 634 and 636.

In the Matter of the Contempt of ALEXANDER McKENZIE in Having Disobeyed and Refused to Comply with the Terms of the Writs of Supersedeas Duly Issued Herein.

Opinion and Judgment.

In the United States Circuit Court of Appeals for the Ninth Circuit.

Filed February 11, 1901.

JOHN I. TORNANSES, Appellant,
vs.
L. F. MELSING ET AL., Respondents.

WILLIAM A. KJELLMAN, Appellant,
vs.
HENRY ROGERS, Respondent.

Opinion and Judgment.

Page, McCutchen, Harding and Knight, for appellants.
Thomas J. Geary and A. C. Severance, for respondent Alexander McKenzie.

Before Gilbert, Ross, and Morrow, circuit judges.

Ross, *circuit judge*, delivered the opinion of the court:

The proceedings now before the court in the above-entitled cases grow out of the alleged disobedience by one Alexander McKenzie of certain writs of supersedeas issued out of this court upon the order of Honorable William W. Morrow, one of its judges. They have been argued and submitted together and will be so considered. Each case originated in the United States district court for the second division of the district of Alaska, of which Arthur H. Noyes is the judge,

George V. Borchsenius, the clerk, and C. E. Dickey, a deputy clerk. Placer mining claim known as No. 10 Above Discovery, on Anvil creek, a tributary to Snake river, was the subject of controversy in the action of Melsing *et al. vs.* Tornanses, and placer mining claim No. 2 Below Discovery, on the same creek, was the subject of contention in the action of Rogers *vs.* Kjellman. Both claims are situated within the Cape Nome mining district of Alaska. The act of Congress under which Judge Noyes was appointed was approved June 6, 1900. (31 Stats. at Large, 321.) In its fourth section it is provided that: "The judge designated to preside over division numbered two (within which division is the Cape Nome mining district) shall reside at Saint Michaels during his term of office, and shall hold at least one term of court each year at Saint Michaels, in the district, beginning the third Monday in June." It is further provided in the fourth section that each of the three judges provided for by the act "is authorized and directed to hold such special terms of court as may be necessary for the public welfare or for the dispatch of the business of the court, at such times and places in the district as they or any of them, respectively, may deem expedient, or as the attorney general may direct;" and that "at least thirty days' notice shall be given by the judge or the clerk of the time and place of holding special terms of the court."

It is not pretended that Judge Noyes held any term of the court at Saint Michaels in June, or that any notice was given by him or the clerk of the court of the holding of a special term thereof at Nome, or elsewhere, prior to the acts out of which the present proceedings arise. On the contrary, it appears from the records and proofs on file in this court that the steamer on which Judge Noyes went from the city of Seattle, Washington, to Alaska did not reach the roadstead of Nome until July 19, 1900, and that he did not go ashore until Saturday, July 21. Two days thereafter, to wit, Monday, July 23d, he signed orders appointing Alexander McKenzie receiver of said placer mining claims, with directions to take immediate possession thereof and to manage, mine and work the same; to preserve the gold, gold dust, and proceeds resulting from the working and mining of the claims, and to dispose of the same subject to the further orders of the court; and further ordering the persons then in possession of the claims to deliver to the receiver their immediate possession, control, and management and expressly enjoining them from in any manner interfering with the mining or working of the claims by the receiver, or with his control or management thereof. The amount of the bond required by the judge of the receiver was $5,000 in each case. These orders were signed at the same time, and the circumstances under which they were made appear in the proceedings of the court of August 3d, 1900, on the motion of counsel for the parties against whom they were directed, made for their annulment on July 24th. We extract from the record in the case of Melsing *et al. vs.* Tornanses—precisely similar proceedings appearing also in the case of Rogers *vs.* Kjellman:

"Upon the hearing of the applications to set aside appointments of receiver in the Anvil Creek cases, Mr. Knight, of counsel for defendant, after reading affidavits in support of his application, continued as follows:

In addition, if the court please, to these affidavits, we desire to introduce the records of the court in this case; and if Mr. Dickey is here, I desire to call him as a witness.

The COURT: I believe Mr. Dickey is inside.

Mr. KNIGHT: I desire to call Mr. Dickey with reference to the filing of these papers.

(It is ascertained that Mr. Dickey is not in.)

The COURT: The records are here; can you use them instead?

Mr. KNIGHT: I desire to prove, if the court please, that the papers were not filed in this case until after an order had been made appointing a receiver; and further, that no process was issued at that time, or summons, and that so far as I know it has not been issued at the present time.

Mr. HUME: So far as the plaintiff is concerned, the papers were delivered to the clerk to be filed, all at the same time.

Mr. KNIGHT: The summons has not been served on any of our people.

Mr. HUME: So far as I know, the summons has not been served in any of these cases. Preparation was made to serve the summons, but the defendants came into court the next morning, and the question of the propriety of their appearance here before answer coming up, personal service has been delayed until the court should pass upon that matter. We have been getting the papers ready to serve each and every person interested with a copy of the complaint.

Mr. KNIGHT: I wish simply to make the point that the papers were not filed before the order was issued.

The COURT: All the papers were before the court; they were left here.

Mr. KNIGHT: But my point is, that they were not filed until after the order appointing the receiver was made, and that the order was made before process issued. I think your honor will agree as to the fact that the bill of complaint was presented to your honor on the afternoon of the 23d day of July, 1900, and that your honor thereafter made an order appointing a receiver, and the papers were subsequently that evening handed to the deputy clerk of the court for filing, but that no process was issued in the cases in which I now appear—that is, in the cases involving No. 2 Below, Nos. 10 and 11 Above, and No. 1 Nakkela. Mr. Hume, is that correct?

Mr. HUME: Well, of course, as to the time they were filed, we can agree to this fact: that all the papers, the affidavits and bills of complaint and summons, were all presented here to the court. They were not presented to the clerk. We couldn't find the clerk at that time; he had no office. They were presented to the court and left

with the court. All the papers were left with the court, and the clerk was to file them; but, he being out some place, we were unable to find him, and he having no special office, we presumed they were not filed until later. Everything was in confusion then, and we simply left the papers with the court; that is all we could do.

The COURT: I remember this—that the papers were here on the table and I called Mr. Dickey's attention to them.

Mr. KNIGHT: After the order had been made?

The COURT: Oh, yes.

Mr. KNIGHT: It is agreed further, then, that no process has yet issued in this case?

Mr. HUME: I think the summons has been issued. I know it was made out.

Mr. KNIGHT: But no process has been placed in the hands of an officer for service?

Mr. HUME: No, I think not. I think not placed in the hands of an officer.

The COURT: I think you will find as a matter of record that the summons has been issued.

Mr. KNIGHT: As far as the issuance of process is concerned, the records will speak for themselves."

It thus appears that the injunctions and orders appointing a receiver of the claims in question were made before the organization of the court, without notice of any character, and before any paper of any kind had been placed on the files of the court—assuming the court to have been organized and in condition for the transaction of business. Not only so, but the injunction granted and the appointment of the receiver in the case of Rogers *vs.* Kjellman was based upon a pleading which is without a single allegation of an equitable nature. That pleading alleges only the citizenship of the plaintiff Rogers and the alienage of the defendant Kjellman; the competency of the plaintiff to make locations under the mining laws of the United States; his discovery of gold on, and his location of claim No. 2 Below Discovery, on Anvil creek, on the 6th day of June, 1899; his marking of its boundaries in accordance with the statutes of the United States and with the local rules of the mining district within which it is situated, and the recordation of notice of the location in the office of the recorder of the district; the possession of the claim by the plaintiff until his dispossession by the defendant on or about July 1, 1899; the withholding thereof by the defendant ever since, and the extraction therefrom by the defendant and others under him of one hundred thousand dollars in gold and gold dust, to the damage of the plaintiff in that sum and the right of the plaintiff to a restitution of the possession of the claim. The prayer is only for such restitution of possession of the property and for one hundred thousand dollars damages, and for costs. In other words, the complaint in the case of Rogers *vs.* Kjellman, upon which the judge granted an injunction and appointed a receiver, was an ordi-

nary complaint in ejectment, without a single allegation of even an equitable nature. It is true there was presented to the judge at the same time, the affidavit of the plaintiff Rogers and the affidavit of one Charles Cooper in which they swore, in substance, that the defendant Kjellman was not a citizen of the United States and had never declared his intention to become such; had never located or marked the claim in question in accordance with law, but had extracted therefrom during the mining season of 1899 gold to the amount of one hundred thousand dollars and removed the same beyond the jurisdiction of the court, and that his servants and assigns were then in the possession of and working the claim, whose only value consisted of the gold it contained, and, if allowed, would continue to work the claim and extract therefrom five thousand dollars a day and appropriate the same to their own use, in fraud of the plaintiff's rights.

In the case of Melsing *et al. vs.* Tornanses, the order granting the injunction and appointing the receiver was based upon an unverified bill praying for an injunction and an order appointing a receiver, supported by the affidavits of one T. H. Downing and one E. W. Bacon. L. F. Melsing, H. L. Blake, D. B. Libby, W. T. Hume, and O. P. Hubbard are the complainants in that bill and John I. Tornanses is the sole defendant thereto, although it appears in more than one place in its body that the complainants contemplated naming other parties also as defendants. In the bill it is, among other things, alleged "that the complainant, L. F. Melsing, has begun an action at law against the defendants herein to recover the possession of the premises herein described, a copy of which complaint is attached to this bill and made a part hereof; that in order to preserve the rights of the complainant in said action at law and in said placer mining claim pending the termination of said action at law, to prevent the extraction of gold from said claim and the appropriation thereof by defendants, his lessees, agents, servants, employees, and grantees, and preserve the said property and the gold extracted therefrom, it is necessary, proper, and convenient that a receiver should be appointed by this honorable court to take possession of, charge of, and care for said claim, and to hold, operate, and mine and control the same, under the orders of this honorable court until the termination of said action at law; that the complainants, H. L. Blake, D. B. Libby, O. P. Hubbard, and W. T. Hume, are grantees, for a valuable consideration, of the said complainant, L. F. Melsing, of an undivided interest each in said placer mining claim, and are the owners of a substantial and undivided interest in the land and premises hereinbefore described, alleged, and designated as said placer mining claim No. 10 Above Discovery, on Anvil creek."

The record shows that the complaint in the action at law thus spoken of was verified by Melsing on the 25th day of August, 1899, and is entitled in the district court of the United States for the district of Alaska, which court was abolished by the act of Congress of June 6, 1900 (31 Stats. at Large, 321). That complaint, however,

appears from the record to have been filed in the district court for the district of Alaska, second division, created by the last-mentioned act of Congress, at the time the bill in the case of Melsing *et al. versus* Tornanses was filed therein, together with an affidavit of Melsing, made by him on the 25th day of August, 1899, evidently to be used in some way in connection with the action at law entitled in the abolished court. The bill in the case of Melsing *et al. vs.* Tornanses further alleges that on the 11th day of March, 1899, Melsing discovered gold in the ground known as said placer mining claim No. 10 Above Discovery, and, being at the time competent to do so, located the ground under the mining laws of the United States, marking the boundaries thereof in accordance with law and recording the notice of the location in the office of the recorder of the district in which the claim is situated, and took peaceable possession thereof; that thereafter and on or about May 1, 1899, the defendant Tornanses wrongfully and forcibly, by himself and others under him, ejected Melsing from the premises and took possession of the claim, and has ever since withheld its possession from him; that during the mining season of 1899 the defendant worked the said claim and extracted therefrom gold of the value of at least one hundred and fifty thousand dollars, and at the opening of the season of 1900 commenced, and still continues the working of the claim, thereby extracting therefrom each day gold and gold dust of the value of at least five thousand dollars, all of which the defendant Tornanses, his lessees and grantees, have appropriated to their own use and benefit, to the injury of the complainants and in fraud of their rights; that the ground is valuable only for the gold it contains and that the defendant Tornanses, his agents, lessees, and grantees are insolvent, and that the defendant Tornanses is an alien and has never declared his intention to become a citizen of the United States. This bill, as has been said, was never verified. The affidavits of Downing and Bacon, presented in support of the bill, are only to the effect that in July, 1900 (that of Bacon fixing the date as the 19th of that month), they saw working upon claim No. 10 Above Discovery a large number of men, under, as they were informed and believe, the defendant or his assigns or grantees, and that the claim was being unskillfully worked, with the object of taking only the richest pay-dirt, without regard to the manner in which the claim would be left thereafter, and that the continuation of such work in that manner would destroy the value of the claim. The affidavit of Bacon further states that he was informed by the men at work that they were getting gold therefrom at the rate of a dollar a shovel, and that in addition to the work by hand the persons working the ground had a steam plant in operation thereon for the purpose of expediting the extraction of the gold contained therein, and that the pay-dirt was then so exposed as to be easily sluiced and worked when there should be sufficient water in Anvil creek, and that when there should be more water in the creek the parties then working the ground "could take thousands of

dollars out of said claim, and virtually destroy the same for sale or proper operation, unless restrained by order of the court."

It was upon the showing here stated and under the circumstances above detailed that Judge Noyes, on the 23d day of July, 1900, signed the orders granting the injunctions and appointing the receiver of the mining claims in question, who at once took possession of them. On the 24th day of July, 1900, in the case of Melsing *et al. vs.* Tornanses, and on the 30th day of July, 1900, in the case of Rogers *vs.* Kjellman, the parties claiming under Tornanses and Kjellman moved the court to vacate those orders, supporting the motions by the notices of location of the respective claims by Tornanses and Kjellman, by their respective deeds of conveyance, and by numerous affidavits. The notice of location by Kjellman of claim No. 2 Below Discovery, described the claim, set forth the discovery of gold thereon on the 22d day of September, 1898, and its location on that day, and appears to have been witnessed by John Brynteson and Erik O. Lindblom, and was filed for record at 12 o'clock noon on October 12, 1898, with A. N. Kittelsen, recorder of the mining district. The notice of location by Tornanses of claim No. 10 Above Discovery, was similar, and purported to have been witnessed by G. W. Price and A. N. Kittilsen, M. D., and filed for record at 12 o'clock noon on October 18, 1898. The deeds thus presented to the court were conveyances from those original locators, for a valuable consideration, to Charles D. Lane of their interests in the claims. The affidavits presented in support of the motions to vacate the orders referred to, set forth, among other things, that Tornanses was the first locator of the aforesaid claim No. 10 Above Discovery, and that Kjellman was the first locator of the aforesaid claim No. 2 Below Discovery; that prior to the respective locations gold was discovered by the locator in the ground located, and that in making each of said locations the boundaries thereof were so marked upon the ground that they could be readily traced, and that from the time of their location each of the claims was in the possession of the locator and his successors in interest, and during each working season thereafter was mined for gold in a proper, miner-like way; that the conveyance of those claims to Lane was made to him for and on behalf of the Wild Goose Mining and Trading Company, a corporation—that of the aforesaid claim No. 2 Below Discovery, on the 9th day of September, 1899, and that of the aforesaid claim No. 10 Above Discovery, on the 18th day of September, 1899, since which time neither Kjellman nor Tornanses have ever had possession of, or control over, either of said claims, but that both of them thereupon departed from the United States, and neither has ever returned, and that the property has since been held and worked by Lane and those holding under him, and was so worked and held at the time of the initiation of these cases. The affidavits on behalf of the moving parties also deny the alleged insolvency of Lane and those holding under him, and, on the contrary, aver that both Lane and the Wild Goose Mining and Trading Company are amply able to respond in any damages that may be recovered against them.

In each case the district court, on the 10th day of August, 1900, made and entered an order denying the motion so made to vacate the order granting the injunction and appointing the receiver, and on the 14th day of August, 1900, counsel for the defendants, in each case, petitioned the court for an order allowing an appeal from the order granting the injunction and appointing the receiver, at the time presenting to the court a proper bond on appeal, together with an assignment of errors and a proposed bill of exceptions for settlement and allowance; in response to which the judge, on the 15th day of August, 1900, made an order in each case "that said proposed bill of exceptions is in each and every part thereof disallowed as a bill of exceptions herein, and the settlement thereof, or of any proposed bill of exceptions herein, is hereby refused; that said petition for an order allowing said appeal is hereby denied, and said judge declines to accept or fix the amount of any bond for costs thereof, or allow a supersedeas bond to be given, or fix the amount thereof.

Dated Nome, Alaska, August 15, 1900.

ARTHUR H. NOYES, *Judge.*"

On the same day, to wit, August 15th, 1900, the judge made and entered the following order in each case:

"Now, at this time, comes the plaintiff by his attorneys, Hubbard, Beeman & Hume, and Dudley Du Bose, and moves the court for an additional and further order in the matter of the appointment of Alexander McKenzie, as receiver in the above-entitled suit, and the court being fully advised in the premises:

It is further ordered that in addition to the powers and authorities already granted the receiver appointed, the said receiver is hereby ordered to take possession of the placer claim mentioned in the complaint herein, and all sluice-boxes, dams, excavations, machinery, pipe, boarding-houses, tents, buildings, safes, scales, and all other personal property fixed or movable on the said placer claim; also all gold, gold dust, precious metals, money, books of account, and each and all personal property upon the said claim connected therewith, and in any way appertaining thereto, in possession of and under the control of the defendant, his lessees, grantees, assigns, employees; and all and every person in possession of the said claim or claiming any right, title or interest in and to the said placer claim, or any gold dust therein or any personal property thereon of any nature whatsoever, are hereby ordered to deliver the same to the said receiver, and are hereby restrained from interfering with the said receiver in quiet and peaceable possession of the same, or any agent that the said receiver may designate to take possession thereof.

It is further ordered that this order shall revoke all and any order in conflict herewith, and does hereby revoke the same; and

It is further ordered that this order shall remain in full force and effect until further order of this court.

It is further ordered that a copy of this order shall be served upon

any person in possession of or claiming possession of the property described.

Done in chambers this 15th day of August, 1900.

ARTHUR H. NOYES, *Judge*."

For this sweeping order against any and every person, whether a party to the suit or not, and this express requirement of the receiver to take possession, among other things, of all sluice-boxes, machinery, pipe, boarding-houses, tents, safes, scales, money, books of account, and all other personal property upon the claims, of whatsoever kind or nature, no basis of any kind appears from the records which have been brought here upon certiorari to have been presented to the court below, although the order recites upon its face that the court was "fully advised in the premises." Nor does it appear that the slightest attention was paid to an express provision of the very statute under which the court was created and existed, in terms prohibiting the appointment of a receiver in any action for the recovery of specific personal property (Alaska Code, sec. 753), nor to sections 301 or 475 of the same code, which provide as follows:

"SEC. 301. Any person who has a legal estate in real property, and a present right to the possession thereof, may recover such possession, with damages for withholding the same, by an action. Such action shall be commenced against the person in the actual possession of the property at the time, or, if the property be not in the actual possession of any one, then against the person acting as the owner thereof."

"SEC. 475. Any person in possession, by himself or his tenant, of real property, may maintain an action of an equitable nature against another who claims an estate or interest therein adverse to him for the purpose of determining such claim, estate, or interest."

It will be observed from these provisions that by the code governing Alaska an action of ejectment is required to be brought "against the person in the actual possession of the property at the time, or if the property be not in the actual possession of any one, then against the person acting as the owner thereof;" and that the right to maintain an equitable action for the purpose of determining an adverse claim, is only given to one in possession by himself or his tenant.

The successors in interest of the defendants to the suits having thus been denied an appeal from the orders granting the injunctions and appointing a receiver, not only of the mining claims in question, but of their personal property as well, with directions to the receiver to extract from the claims the gold which constituted their sole value, the defendants applied, with all speed possible, to a judge of this court for the allowance of the appeals which had been denied them in Alaska. The judge of this court to whom the applications were made, and upon a showing embracing much of this shocking record, at once granted the appeals, requiring and approving a supersedeas bond in each case in the sum of $20,000, and

thereupon ordered a writ of supersedeas to issue out of this court under its seal, in each case; and, in writing, approved the form thereof, staying all proceedings under the orders granting the injunctions and appointing the receiver, and further ordering the receiver to at once restore to the defendants from whom he had taken them the said mining claims, together with the gold, gold dust, and other personal property received by him under the orders appealed from. Certified copies of the order allowing the appeal in each case, together with certified copies of the assignment of errors and of the bond, were, with the original writ of supersedeas and the original citation in each case, filed in the lower court on the 14th day of September, 1900, and copies thereof at once served upon the receiver McKenzie and a demand made upon him for the restitution of the property in accordance with the writs.

The evidence taken upon the hearing of these proceedings is to the effect, and we so find the fact to be, that the respondent McKenzie thereupon refused and continued to refuse to restore, in accordance with the requirements of the writs of supersedeas, the gold, gold dust, and other personal property received by him under the orders of the trial court, and that fact being made to appear to this court by affidavits on the 1st day of October, 1900, and it further being then made to appear to this court that the last steamer for the season would leave the city of Seattle for Nome within a few days and that no further communication could be had with that section of the country until the spring or early summer of 1901, this court thereupon made an order directing its marshal to proceed to Nome, enforce its writs of supersedeas, arrest the offending receiver and produce him at the bar of this court. The evidence taken upon the hearing of these proceedings is also to the effect, and we so find the fact to be, that the respondent McKenzie at all times had it within his power to comply with the requirements of the writs of supersedeas issued out of this court; that he contumaccously refused to restore the gold, gold dust, and other personal property to the defendants, as required by those writs, and has continued such refusal ever since.

It is said by counsel for the respondent McKenzie that the action of Judge Noyes in refusing to allow the appeals petitioned for and in refusing to settle any bill of exceptions, was based upon the opinion that no appeal is allowed by law from the orders made by him; and it is here so contended.

Provision is made by section 504 of the Alaska Code for the taking and prosecution of an appeal from the final judgment of the district court for the district of Alaska, or any division thereof, direct to the Supreme Court of the United States in certain cases within which the present cases do not come, and it is then provided "that in all other cases, where the amount involved or the value of the subject-matter exceeds the sum of five thousand dollars, the United States circuit court of appeals for the ninth circuit shall have jurisdiction to review upon writ of error or appeal the final judgment

(and) orders of the district court." And section 507 of the same code declares that "an appeal may be taken to the circuit court of appeals from any interlocutory order granting or dissolving an injunction, refusing to grant or dissolve an injunction, made or rendered in any cause pending before the district court within sixty days after the entry of such interlocutory order. The proceedings in other respects in the district court in the cause in which such interlocutory order was made shall not be stayed during the pendency of such appeal, unless otherwise ordered by the district court."

Leaving out of consideration the last-quoted section, which in express terms authorizes an appeal from an order granting an injunction and without considering the right of the defendants to the suits in question to thus have reviewed the orders enjoining them from working the mining claims involved in them, and as a necessary incident the right of the court to appoint a receiver of the property claimed by them, we think we may safely rest the jurisdiction of this court to review those orders upon section 504 of the Alaska Code above referred to. And it is for this court, subject to review of its action by the supreme court, to determine whether it may entertain jurisdiction of the cause removed and to dispose of controversies in respect to the form of its writs, the parties, the citation, and their service, without interference from any other court. (*In re* Chetworth, 165 U. S., 443.) Courts take judicial notice of the general physical and climatic condition of the country within their jurisdiction. We therefore know judicially, as well as from the record in these cases, that the sole value of the mining claims in question consisted in the mineral contained in them. The extraction of that is, therefore, the taking of the very substance of the estate, and when all of it is removed nothing of value will remain in the claims. In the case of a vein or lode mine, with tunnels, drifts, and shafts in which there are timbers to be placed, replaced or repaired, or water to be controlled, it sometimes happens that the appointment of a receiver becomes necessary to take possession of and operate the mine pending the litigation, in order to preserve the property; but even in that class of cases the necessity for a receiver is not of frequent occurrence. This is well shown in the case of Bigbee *vs.* Summerour, 101 Ga., 201, 228; S. E. Rep., 642. So, too, in the case of placer mining claims valuable only for the oil contained in them, where it becomes necessary for the proper preservation of the claim that the ground be worked to prevent its substance from being drawn off by the operation of wells on adjoining ground, or where it is shown that a receiver is necessary in order that the annual work required by law may be performed for the benefit of the party who may ultimately be adjudged entitled to the ground. But nothing of that sort is shown to have existed with respect to the claims here involved. Here, the gold in the claim would have remained as safe as it was during all the ages it had been there, and an injunction (assuming a proper showing for one to have been made) staying the working of the claims pending the litigation would have perfectly preserved the

property for whomsoever might be ultimately adjudged to be entitled to it. The value of mining property of every character, like the value of any other kind of property, largely depends upon the manner in which it is operated. Many good mines prove unprofitable because of loose management or extravagant methods of working them. The successors in interest of the defendant to the suits in which this receiver was appointed were in possession of the claims under a claim of right, and were engaged in mining the ground on a large scale and had been so engaged during the working season of the year 1899, — well as that of the then current season of 1900. They may, therefore, be properly presumed to have been, at least, somewhat familiar with the proper working of placer claims. But there is no evidence that the respondent ever saw a placer, or any other kind of mining claim before he was appointed receiver of these and, at least, two other similar claims on the 23d day of July, 1900. It is in evidence in at least one of the contempt proceedings now pending before us against McKenzie that, shortly before going to Alaska, he caused to be organized a corporation called the Alaska Gold Mining Company, with a capital stock of fifteen million dollars, a majority of which he held, and that, having placed a portion of the remainder where he thought it would stand him in good stead, he proceeded with Judge Noyes to Nome, arriving there on Saturday, July 21st, 1900, and on Monday, July 23d, before the court was organized and before the filing of any paper of any character with the clerk of the court, was appointed by Judge Noyes receiver of at least four of the richest claims in the district of Nome, upon complaints made by persons the interest therein of at least one of whom had theretofore been acquired by the receiver's corporation, the Alaska Gold Mining Company. It has been already seen that the orders under which this was done in the present cases directed the receiver to take possession of and mine the claims in question, and enjoined the parties then in possession from in any manner interfering with the claims or with the acts of the receiver. It has been seen, also, that in the case of Rogers *vs.* Kjellman this was done upon a complaint which did not even ask for the appointment of a receiver or for such injunction, and, in the case of Melsing *et al. vs.* Tornanses, that the only relief that was asked was the granting of an injunction and the appointment of a receiver, all of which was granted by the court by the orders made by it on July 23d, 1900.

We have no hesitation in holding that an order by which a placer mining claim, whose proper preservation in no respect requires it, is taken from one who is in the actual possession thereof, and turned over to a receiver, with instructions to extract from it its only value, is, in effect, a final decree and appealable as such; for its entire value may be thus destroyed by improper working or extravagant management, or by the extraction of all its mineral, while he from whom it is taken and who asserts a right to it, may prefer to work the claim to a limited extent only, or in a particular manner, or not at all. He may prefer to hold it for sale or other disposition; yet, under

ich orders as are here involved, the operations of the receiver of ecessity constantly exhausts the very substance of the property, and ay speedily render it absolutely worthless. Surely, the authority, y whatever name called, under which such a result may be wrought , in effect, a final judgment. As was said by the circuit court f appeals for the third circuit, in Potter *vs.* Beal, 50 Fed. Rep., 3, the determination of the question as to what is or is not a nal decree "is to be governed by the essence of what is done, and ot by the appellation given to it," In the Farmers' Loan & Trust ompany case, 129 U. S., 206, it was held that an order allowing a eceiver of a mortgaged railroad to issue certificates which should e preferred to the mortgage, was a final decree in effect, and ap- ealable. In the case of Sharon *vs.* Sharon, 67 Cal., 215, the supreme ourt of California held that an order made *pendente lite* directing he payment of alimony in a divorce suit, is in the nature of a final ecree and appealable as such. (See also The Tampa Railway Com- any case, 168 U. S., 583, 588, and Iron Co. *vs.* Meeker, 109 U. S., 80.) A mine is, as was held in Bigbee *vs.* Summerour, *supra*, estroyed as such, as fast as the mineral is taken out; so that the ecessary effect of the orders in question was to gradually and erhaps rapidly, destroy the mining claims, and as a matter of course, he personal property embraced by the orders would necessarily erish by use.

The remaining point urged on behalf of the respondent may be riefly disposed of. It is contended that in order to give effect to he orders made by Judge Morrow allowing the appeals it was ssential to file the original orders in the lower court. Only certi- ied copies of those orders were so filed; but the original citation nd the original writ of supersedeas were filed in the lower court in hese cases, together with certified copies of the assignment of errors nd of the supersedeas bond. All of these papers were filed in the istrict court, September 14th, 1900. That that was sufficient to give ffect to the appeal has been expressly decided by the Supreme ourt in two cases—Brown *vs.* McConnell, 124 U. S., 489, and Stew- rt *vs.* Masterson, *id.*, 493.

Section 1007 of the Revised Statutes declares:

"In any case where a writ of error may be a supersedeas, the de- endant may obtain such supersedeas by serving the writ of error, y lodging a copy thereof for the adverse party in the clerk's office here the record remains, within sixty days, Sundays exclusive, fter the rendering of the judgment complained of, and giving the ecurity required by law on the issuing of the citation. But if he esires to stay process on the judgment, he may, having served his rit of error as aforesaid, give the security required by law within ixty days after the rendition of such judgment, or afterward with he permission of a justice or judge of the appellate court. And in uch cases where a writ of error may be a supersedeas, execution hall not issue until the expiration of (the said term of sixty) (ten) days."

It is contended that the supersedeas thus provided for by statute does not require the restoration to the defendants, pending the appeal, of any property taken by the receiver. Let that be admitted, and the fact remains that, in each of these cases, Judge Morrow ordered a writ of supersedeas to be issued out of this court, under its seal, and, in writing, approved the form of the writs, each of which required the receiver, among other things, to restore to the possession of the defendants the personal property he had taken from them, together with the gold and gold dust extracted by him as such receiver from the claims. It is said that a single judge of this court cannot grant a writ of supersedeas. Sections 1000 and 1007 of the Revised Statutes—the case *In re* Claasen, 140 U. S., 200, rule 36 of the Supreme Court, and section 11 of the act approved March 3, 1891, creating this court—conclusively answer this objection.

By section 11 of the circuit court of appeals act it is, among other things, provided that "any judge of the circuit court of appeals, in respect of cases brought, or to be brought, to that court, shall have the same powers and duties as to the allowance of appeals or writs of error, and the conditions of such allowance, as now by law belong to the justices or judges in respect of the existing courts of the United States respectively." In the case *In re* Claasen, *supra*, the Supreme Court held that a justice of the Supreme Court was authorized to grant a supersedeas—saying: "By section 1000 of the Revised Statutes it is provided that every justice or judge signing a citation on any writ of error shall take security for the prosecution of the writ, and for costs, where the writ is not to be a supersedeas and stay of execution, and for damages and costs where it is to be. In a criminal case, there are no damages; and in such a case, the United States being a party, it is provided by subdivision 4 of rule 24 of this court, that in cases where the United States are a party no costs shall be allowed in this court for or against the United States.

Section 1007 of the Revised Statutes provides for the manner in which a supersedeas may be obtained on a writ of error. It is by serving the writ of error, by lodging a copy thereof for the adverse party in the clerk's office where the record remains within sixty days, Sundays exclusive, after the rendering of the judgment complained of, and giving the security required by law on the issuing of the citation. But as there is no security required in a criminal case, the supersedeas may be obtained by merely serving the writ within the time prescribed, without giving any security, provided the justice who signs the citation directs that the writ shall operate as a supersedeas, which he may do when no security is required or taken.

We hold, therefore, that the allowance of the supersedeas in the present case was proper, and we deny the motion to set it aside.

To remove all doubt on the subject, however, in future cases, we have adopted a general rule, which is promulgated as rule 36 of this court (see 139 U. S., 706), and which embraces, also, the power to admit the defendant to bail after the citation is served."

The rule thus referred to and adopted by the Supreme Court will be found in 139 U. S., 706, and is as follows:

"1. An appeal or a writ of error from a circuit court or a district court direct to this court, in the cases provided for in sections 5 and 6 of the act entitled 'An act to establish circuit courts of appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes,' approved March 3, 1891, may be allowed, in term time or in vacation, by any justice of this court, or by any circuit judge within his circuit, or by any district judge within his district, and the proper security be taken and the citation signed by him, and he may also grant a supersedeas and stay of execution or of proceedings, pending such writ of error or appeal."

It is further contended that the scope of the writs was too broad, in that, in the first place, they went beyond the orders of Judge Morrow, and, in the second place, that it was beyond the power of the court to require the receiver to restore the property taken by him. It is true that the orders first made by Judge Morrow did not in terms direct the receiver so to restore the property, but in each case that judge subsequently, and on the same day, made an order expressly approving the form of the writs requiring such restoration. If it be conceded that the scope of the writs was too broad, it was not for the receiver to ignore their requirements and himself be the judge of that question, but his only proper remedy was a motion to modify the writs. While refusing to obey them he should not be heard to object to their scope. In 2 High on Injunctions, section 1416, it is said that: "If defendant is in doubt as to the scope or extent of the injunction, he should not be left to disregard or violate it, with a view of testing such questions, but should apply to the court for a modification or construction of its order." The same rule is applicable to a receiver. (See, also, Wells, Fargo & Co. *vs.* Oregon Ry. & Nav. Co., 19 Fed. Rep., 20; Ullman *vs.* Ritter, 72 Fed. Rep., 1000, 1003; Maginnis *vs.* Parkhurst, 4 N. J. Eq. Rep., 433, 436.) But the point itself is, we think, untenable. In the leading case upon the subject, that of The State *vs.* Johnson, 13 Florida, 33, 48, it is said: "The allowance of a supersedeas does not, nor does the order in this case 'undo' or reverse the order of the circuit judge. The order, following the intent and effect of the law in terms directs a stay of all proceedings under the several orders appealed from, and suspends their operation. The power of the circuit court was suspended, and thereby the power of all the officers in that court, under its orders in question, became inoperative. They no longer had any duties to perform under such orders. The authority of the receiver to continue to act as such was made nugatory by the operation of the law. He had entered upon an office and commenced to act, when the office was suspended. The supersedeas as understood by us, and as seems to be understood by the courts, does of necessity retroact by suspending the life of the order appealedf rom; reaches back to that order and forbids action under it.

"It does not make unlawful an act done in pursuance of the order before the appeal was taken, but it forbids the court and its officers further to act. No new rights having been created, and the duties of the receiver being superseded, the bond standing in the place of the property in his hands, and he having been notified thereof by proper process, it was his duty to restore that which had come to his hands, to the parties from whom it had been taken and withheld; for his authority to take, being inoperative by the suspension, his authority to hold was equally so, both being derived from the same order." The case of State *vs.* Johnson has been several times approved. (Buckley *vs.* Georgia, 71 Miss., 580; Farmers' Nat. Bank *vs.* Backus, 63 Minn., 115. See, also, Everett *vs.* State, 28 Md., 190; Freeman on Ex., 2 ed., sec. 271*a*, p. 876; High on Receivers, 3d ed., section 190, p. 164; 20 Am. & Eng. Ency. L., 110.)

In the last edition (Anderson's) of Beach on Receivers, p. 129, sec. 117, it is said that "from the authorities and reason there may be legally deduced the following principles which should govern questions concerning the subject of this section:

* * * * * * *

2. If a receiver be appointed and takes possession of the property prior to the appeal and supersedeas, the consummation of the appeal with bond and supersedeas gives to the defendant the right to demand and have the property returned to him."

Finally, it is urged that the refusal of the receiver to obey the writs of supersedeas issued out of this court was based on the advice of his counsel that the writs were void. Such advice is never a justification of a contempt, but in proper cases may be considered in mitigation of the offense. (1 Beach on Injunctions, sec. 250; High on Injunctions, sec. 1427; Rogers *vs.* Pitt, 89 Fed. Rep., 424, and cases there cited.)

The circumstances attending the appointment of the receiver in these cases, however, and his conduct after, as well as before, the appointment as shown by the record and evidence, so far from impressing us with the sincerity of the pretension that his refusal to obey the writs issued out of this court was based upon the advice of his counsel that they were void, satisfy us that it was intentional and deliberate, and in furtherance of the high-handed and grossly illegal proceedings initiated almost as soon as Judge Noyes and McKenzie had set foot on Alaskan territory at Nome, and which may be safely and fortunately said to have no parallel in the jurisprudence of this country. And it speaks well for the good, sober sense of the people gathered on that remote and barren shore that they depended solely upon the courts for the correction of the wrongs thus perpetrated among and against them, which always may be depended upon to right, sooner or later, wrongs properly brought before them. And it is well, in these days of the rapid extension of our national domain, for all persons, whether residing in remote regions or nearer home, to remember that courts which respect themselves and have a due regard for the administration of justice

and the maintenance of law and order, will never tolerate any disobedience of their lawful orders, writs or judgments, wherever committed within their jurisdiction. "It is inherent in the nature of judicial authority," said the supreme court of Florida in the case of State *vs.* Johnson, *supra*, that "every court may protect and maintain its jurisdiction under the law, and that it shall protect itself against all attempts to resist, or thwart, or overthow its authority. Without the power to judge of its jurisdiction, it is practically without jurisdiction. Without the power to enforce its judgments, it has no judicial authority. That it be made the plaything of whomsoever may choose to deride its judgments or its process, and ignore its existence and its acts, because the opinions of the judges and the judgments of the court may not meet the approval of counsel upon the one side or the other of a controversy, or may not be in accordance with the opinions or the wishes of subordinate officers, cannot be allowed without surrendering the judicial character and confessing the impotency of this department of the Government. Courts commit errors, and parties may suffer from the improvidence or corruption of their judges, yet the remedy for these is not in individual resistance or in a resort to private judgment. Every court will hear the appeals of those who conceive themselves to be wronged or threatened with injustice by the execution of its decrees. If its errors be made apparent, it will do justice to itself by dealing justice to parties without fear and without hesitation. There is no excuse for resistance of the orders of the courts in this country where their doors are wide open, and where every human being may be heard in the presence of the whole people."

In the refusal of the respondent Alexander McKenzie to obey the writs of supersedeas issued out of this court, as hereinbefore found and stated, it is now here considered and adjudged that he did commit contempts of this court, and for the said contempt so committed in the case entitled Tornanses *vs.* Melsing *et al.* it is now here ordered and adjudged that he, the said Alexander McKenzie, be imprisoned in the county jail of the county of Alameda, California, for the period of six months, and for the said contempt so committed in the case entitled Kjellman *vs.* Rogers that he be imprisoned in the jail of the said county for a like period of six months, making one year in all—the sentence imposed in the said last-mentioned case to commence immediately upon the completion of the term of imprisonment under the first sentence herein.

The marshal will execute this judgment forthwith.

United States Circuit Court of Appeals for the Ninth Circuit.

Filed February 12, 1901.

JOHN I. TORNANSES, Appellant,
vs.
L. F. MELSING *et al.*, Respondents.

WILLIAM A. KJELLMAN, Appellant,
vs.
HENRY ROGERS, Respondent.

Modification of Judgment.

Based upon our understanding of the statement of counsel in t
of the companion cases against the respondent McKenzie for alle
contempt of the process of this court that all of the pending ca
against him had been, in so far as the parties thereto are concern
settled, and that the respondent had restored to the parties fr
whom it had been taken the whole of the property in controver
we so stated in the opinion delivered herein February 11th. T
court is now informed that this is a mistake of fact in respect to
present cases, and that in these cases there has been no settlem
as respects the parties, and there is no showing of the restoration
the receiver of the property in the above-entitled cases as requi
by the writs of supersedeas issued out of this court. The paragra
of the opinion of this court rendered February 11th in which
erroneous statement of fact was made will, therefore, be correct
and the judgment entered in these cases at the same time will
and hereby is, so modified as to direct that the respondent pay
the costs of the contempt proceedings herein, to be taxed by
court.

Supreme Court of the United States.

No. —, Original.—October Term, 1900.

In re Alexander McKenzie, Petitioner.

[March 25, 1901.]

This is an application by Alexander McKenzie for leave to file a petition for *habeas corpus* to relieve him from an alleged unlawful restraint under certain orders of the Circuit Court of Appeals for the Ninth Circuit committing him for contempt.

The petition stated that on July 23, 1900, McKenzie was, by the judge of the second division of the District Court of Alaska, appointed receiver of the property involved in an action then pending in said court, entitled *L. F. Melsing et al* v. *John I. Torhanses*, and was directed by the order appointing him as receiver to take possession of and operate a certain placer mining claim situated on Anvil Creek near Nome, in the District of Alaska; a copy of the order was attached. That he duly qualified as such receiver and took possession of and operated said mine and was engaged in operating the same continuously from the time of his appointment down to and including the 14th day of September, 1900. That on the 29th of August, 1900, an appeal from said order, so appointing him receiver, was allowed by the Hon. W. W. Morrow, judge of the Circuit Court of the United States for the Northern District of California; that a citation on said appeal was on that day signed by the said circuit judge, and a supersedeas bond approved. That none of these papers were filed with the clerk of the District Court of Alaska, 2nd division, until the 14th day of September, 1900. That on the same 29th day of August, 1900, the clerk of the United States Circuit Court of Appeals for the Ninth Circuit issued a writ of supersedeas, a copy of which was attached and made a part of the petition.

"That thereafter and on the 14th day of September, 1900, a copy of such writ of supersedeas was served on your petitioner at Nome, Alaska; that your petitioner immediately ceased operations on said properties so taken possession of by him as such receiver under and in obedience to the order of the District Court of Alaska, 2nd division, but that your petitioner then and there refused to deliver to the defendants in said action the gold and gold dust then in his possession as receiver, and which had come to his possession from operating said properties.

"That thereafter, on the 1st day of October, 1900, the United States Circuit Court of Appeals for the Ninth Circuit made and entered an order directing the United States marshal of the Northern District of California

to attach the person of the said Alexander McKenzie, and produce him before the United States Circuit Court of Appeals for the Ninth Circuit, at the city and county of San Francisco, State of California, to answer to his refusal to obey the said writ of supersedeas hereinbefore referred to, that this matter came on regularly to be heard, and on the 11th day of February, 1901, the said United States Circuit Court of Appeals, Ninth Circuit, ordered and adjudged your petitioner guilty of contempt of said court, and adjudged that he be imprisoned in the county jail of Alameda County, California, for the period of six months, and that by virtue of said judgment and in obedience to it he is now confined in the county jail of Alameda County, California, by Oscar L. Rogers, sheriff of Alameda County, California.

"Your petitioner further states and alleges, as he is advised, that the said United States Circuit Court of Appeals for the Ninth Circuit had no jurisdiction or lawful authority to cause the arrest of your petitioner, or to proceed against him in the manner and form aforesaid, and that the said pretended process, arrest, order, trial, and judgment and warrant whereby your petitioner was committed to the custody of the said Oscar L. Rogers, sheriff, as aforesaid, and whereby he is held in the custody of the said Oscar L. Rogers, sheriff, as aforesaid, and imprisoned and restrained of his liberty, were and are, each and all of them, wholly without authority of law, in violation of law and of the just rights of your petitioner.

"That on the 29th day of August, 1900, the said Circuit Court of Appeals for the Ninth Circuit was without authority of law to issue said writ of supersedeas, so called, or order the said writ to issue, for that it did not then have jurisdiction of the action entitled *L. F. Melsing et al.* v. *John I. Tornanses*, as at that time no appeal had been taken to the said court in the said case of *L. F. Melsing* v. *John I. Tornanses*, or from any order made or entered in said cause by the District Court of Alaska, 2nd division, because:

"(*a.*) On said 29th day of August, 1900, no appeal had been taken in said cause from the District Court of Alaska, 2nd division, to the Circuit Court of Appeals for the Ninth Circuit, for on said date neither the order allowing the appeal nor the assignment of errors, nor the undertaking on appeal, nor citation, had been filed with the clerk of the District Court for the District of Alaska, 2nd division, and no appeal had been allowed by said court or the judge thereof.

"(*b.*) That on the 1st day of October, 1900, when the warrant for the arrest of your petitioner was issued, the Circuit Court of Appeals for the Ninth Circuit was entirely without jurisdiction in the above-entitled cause, for on said date neither the order allowing the appeal nor any assignment of errors or undertaking on appeal had been filed with the clerk of the District Court of Alaska, 2nd division; and, further, that on said date the above-entitled cause had not been docketed in the Circuit Court of Appeals for the Ninth Circuit, nor the record in said cause filed therein, and the return day of the appeal, as designated in the order allowing the appeal herein, and citation signed by the Honorable W. W. Morrow, the judge allowing said appeal, had passed, and there had been no extension of the time to file such record.

"That the said Circuit Court of Appeals for the Ninth Circuit has been at all times without jurisdiction in the action of *L. F. Melsing et al.* v. *John I. Tornanses*, or of any order made therein, for that no appeal to

said honorable court from the District Court of Alaska has ever been taken in the above-entitled action or from any order made therein by said District Court of Alaska, and that neither the order allowing an appeal signed by the Honorable W. W. Morrow on the 29th day of August, 1900, or any assignment of errors in said matter, nor any undertaking upon appeal has at any time been lodged or filed with the clerk of the said District Court of the District of Alaska.

"That the paper entitled a writ of supersedeas annexed hereto was issued by the clerk of the Circuit Court of Appeals, Ninth Circuit, on the order of the Honorable W. W. Morrow, Circuit Judge for the Ninth Circuit, and as such judge and not otherwise; that the said Honorable W. W. Morrow, Circuit Judge as aforesaid, was without authority of law to order the issuance of said writ, for that the same should only be issued, if at all, by the United States Circuit Court of Appeals for the Ninth Circuit, acting as a court, and power to issue the same was not vested in the individual judges thereof; therefore said order of said Honorable W. W. Morrow, Circuit Judge as aforesaid and the said writ issued in obedience to his order, was and is void.

"Defendant alleges that on the dates when it is alleged in the affidavits on which the warrant for the arrest of this defendant was issued this defendant failed to obey said writ of supersedeas said writ of supersedeas was inoperative and void, for that no appeal had been taken to said court in the action entitled *L. F. Melsing, et al.* v. *John I. Tornanses.*

"That the United States Circuit Court of Appeals for the Ninth Circuit and the judges thereof were without authority to issue or direct the issuance of the writ of supersedeas individually in this case, inasmuch as said writ went beyond the proper scope of such writ and nullified the order of the lower court instead of directing a mere stay of proceedings.

"A judge of the Circuit Court of Appeals for the Ninth Circuit had no power to grant the supersedeas staying the proceedings in the court below herein, for the reason that such power was vested exclusively in the District Court of Alaska; that the said Court of Appeals for the Ninth District was and is without jurisdiction in the premises, because:

"(*a.*) There is no provision of law authorizing an appeal from an interlocutory order from the District Court of Alaska appointing a receiver, or from an order refusing to discharge a receiver, and said appeal was not taken or attempted to be taken within the time limited by law.

"(*b.*) Because the order in question made by the District Court of Alaska is an interlocutory order appointing a receiver, and not an interlocutory order granting an injunction or refusing to dissolve an injunction.

"That the United States Circuit Court of Appeals for the Ninth Circuit did not authorize or direct the issuance of the paper entitled a writ of supersedeas, which it is claimed this defendant disobeyed, and which was issued by the clerk of the Circuit Court of Appeals, Ninth Circuit, on the 29th day of August, 1900, and that the same was issued by said clerk without authority of law and was and is void.

"Your petitioner hereto attaches a copy of the record on appeal in said cause, and a copy of the record in the matter of his alleged contempt and a copy of the testimony submitted in the trial of said alleged contempt, marked Exhibits A, B, C, and D."

Petitioner prayed for the writs of *habeas corpus* and certiorari and for his discharge.

"Copy of Order Appointing Receiver.

"Now, on this 23d day of July, A. D. 1900, come the complainants, L. F. Melsing, H. L. Blake, D. B. Libby, W. T. Hume, and O. P. Hubbard, above set forth, and upon the complaint filed in said action on behalf of the complainants comes on for hearing the application of said complainants for the appointment of a receiver, and the same having been considered by the court and the court having been fully advised in the premises, it is now hereby—

"Ordered, adjudged and decreed that Alexander McKenzie of Nome, Alaska, be, and he is hereby, appointed receiver to take charge of and manage and control the placer mining claim mentioned and described in said complaint, and the said receiver is hereby authorized and directed to take immediate possession of said placer mining claim and to manage, mine, and work the same, and perform such other acts and things in and about said premises as are authorized by law, and to preserve the gold and gold dust and proceeds resulting from the working and mining of said claim, and to dispose of the same, subject to the further orders of this court.

"It is further ordered that the said receiver file with the clerk of this court a proper bond with sureties to be approved by the judge of this court, in the penal sum of five thousand dollars, conditional for the faithful discharge of his duties as such receiver, and accounting for all the funds coming into his hands as such, according to the order of this court.

"It is further ordered that the said defendants, and each and all of them, turn over and deliver to said receiver the immediate possession, control, and management of said placer mining claim, and that the said defendants, and each of them, are hereby restrained and enjoined until the further order of this court from interfering with the control or management of said receiver in the mining and working of said placer mining claim, or any part thereof, or from interfering in any manner whatever with the possession or management of any part of the said property over which said receiver is hereby appointed; or in interfering in any manner to prevent the discharge of his duties or of the operation of said property under the order of this court, until the further order of this court."

Copy of Writ of Supersedeas, entitled in the Circuit Court of Appeals for the Ninth Circuit.

United States of America, *ss:*

The President of the United States of America to the Honorable Arthur H. Noyes, Judge of the District Court for the District of Alaska, second division, and to L. F. Melsing, H. L. Blake, D. B. Libby, W. T. Hume, O. P. Hubbard, and Alexander McKenzie, Greeting:

"Whereas, in the above-entitled cause appellant has petitioned this court for an order allowing an appeal to this court from an interlocutory order, judgment and decree given and rendered herein on the 23d day of July, 1900, by the District Court for the District of Alaska, second division, granting unto complainants herein an injunction ordering and directing the defendant and appellant to cease from working a certain mining claim in said bill of complaint mentioned called No. 10 Above Discovery, on Anvil Creek, situated within said District of Alaska, and also ordering and directing said defendant to turn the possession of said mine unto the said Alexander McKenzie, as receiver thereof, and also ordering and

directing said receiver to take possession of said mine and mining property and to conduct and work the same as receiver thereof, together with such other and various things as are in said order provided, and also allowing an appeal from the order made and entered by said court in said action on the 10th day of August, 1900, by which said court denied appellant's motion to vacate and set aside said first-named order, judgment and decree, and has also in said petition prayed for a writ of supersedeas, and said appeal having been by said Circuit Court of Appeals allowed and said petition for a writ of supersedeas granted upon the appellant's filing a bond in the sum of $20,000 to be approved by this court, and said bond in the sum of $20,000 with approved sureties having been filed and approved by this court:

"Now, therefore, you the said L. F. Melsing, H. L. Blake, D. B. Libby, W. T. Hume, O. P. Hubbard, Alexander McKenzie, and Arthur H. Noyes, judge of said District Court for the District of Alaska, second division, and each of you are hereby commanded that from every and all proceedings on any execution of the aforesaid order, or in anywise molesting said defendant and appellant on the account aforesaid, or in any manner interfering with his possession of said property, you entirely surcease and refrain as being superseded, and that you, the said Alexander McKenzie, do forthwith return unto said defendant the possession of any and all property of which you took possession under and by virtue of said order, and that you do make return of this supersedeas together with your acts and doings thereon to said District Court for the District of Alaska, second division, as you will answer the contrary at your peril, and you, the judge of said District Court for the District of Alaska, second division, are hereby commanded to stay any and all proceedings which may have issued as aforesaid upon said order, and to stay any and all further proceedings in relation to said order and the appointment of a receiver thereunder in this case pending the appeal last aforesaid to this court.

"Witness the Honorable Melville W. Fuller, Chief Justice of the United States this 29th day of August, in the year of our Lord one tho usand nine hundred.

[SEAL] F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit."

From the records and exhibits attached to the petition it appeared that on July 24, in the case of *Melsing* v. *Tornanses*, the parties claiming under Tornanses moved the District Court to vacate the order of July 23, supporting the motion by Tornanses' notice of location of his claim, by his deed of conveyance, and by numerous affidavits in respect of action thereunder. The District Judge on August 10 entered an order denying the motion made to vacate the order granting the injunction and appointing the receiver; and on August 14 defendants applied to the District Judge for an order allowing an appeal from the order granting the injunction and appointing the receiver, the proper bond on appeal being at the same time presented to the judge, together with an assignment of errors and a proposed bill of exceptions for settlement and allowance, in response to which the District Judge, on August 15, made an order "that said proposed bill of

exceptions is in each and every part thereof disallowed as a bill of exceptions herein, and the settlement thereof, or of any proposed bill of exceptions herein, is hereby refused; that said petition for an order allowing said appeal is hereby denied, and said judge declines to accept or fix the amount of any bond for costs thereof or allow a supersedeas bond to be given, or fix the amount thereof."

On the same day, to wit, August 15, 1900, the judge made and entered the following order:

"It is further ordered that in addition to the powers and authorities already granted the receiver appointed, the said receiver is hereby ordered to take possession of the placer claim mentioned in the complaint herein, and all sluice boxes, dams, excavations, machinery, pipe, boarding houses, tents, buildings, safes, scales, and all other personal property fixed or movable on the said placer claim; also all gold, gold dust, precious metals, money, books of account, and each and all personal property upon the said claim connected therewith, and in any way appertaining thereto, in possession of and under the control of the defendant, his lessees, grantees, assigns, employees; and all and every person in possession of the said claim or claiming any right, title or interest in and to the said placer claim, or any gold dust therein or any personal property thereon of any nature whatsoever, are hereby ordered to deliver the same to the said receiver, and are hereby restrained from interfering with the said receiver in quiet and peaceable possession of the same, or any agent that the said receiver may designate to take possession thereof.

"It is further ordered that this order shall revoke all and any order in conflict herewith, and does hereby revoke the same; and

"It is further ordered that this order shall remain in full force and effect until further order of this court.

"It is further ordered that a copy of this order shall be served upon any person in possession of or claiming possession of the property described."

The allowance of an appeal, the taking of a supersedeas bond, the issue and approval of a writ of supersedeas, in this and another case, followed. Certified copies of the order allowing the appeal in each case, together with certified copies of the assignments of error and of the bond, were with the original writ of supersedeas and the original citation in each case filed in the lower court on the 14th of September, 1900, and copies thereof served at once upon the receiver McKenzie and a demand made upon him for restitution of the property in accordance with the writs.

The Circuit Court of Appeals from the evidence taken on the hearing of the proceedings in contempt found the fact to be "that the respondent McKenzie thereupon refused and continued to refuse to restore in accordance with the requirements of the writs of supersedeas, the gold, gold dust, and other personal property received by him under the orders of the trial court, and that fact being made to appear to this court by affidavits on the 1st day of October, 1900, and it further being made to appear to this court that the last steamer for the season would leave the city of Seattle for Nome

within a few days, and that no further communication could be had with that section of the country until the spring or early summer of 1901, this court thereupon made an order directing its marshal to proceed to Nome, enforce its writs of supersedeas, arrest the offending receiver and produce him at the bar of this court. The evidence taken upon the hearing of these proceedings is also to the effect, and we so find the fact to be, that the receiver McKenzie at all times had it within his power to comply with the requirements of the writs of supersedeas issued out of this court; that he contumaciously refused to restore the gold, gold dust, and other personal property to the defendants, as required by those writs, and has continued such refusal ever since."

Mr. Chief Justice FULLER delivered the opinion of the Court:

The writ of *habeas corpus* cannot be availed of as a writ of error and unless the writ or orders, for a violation of which petitioner is being punished, in the case referred to in the petition, were absolutely void, this application must be denied. Accordingly it is contended that there was no legal authority for the issue of the writ of supersedeas, and that the Circuit Court of Appeals had not, at the time the writ was issued, nor at any other time, jurisdiction of the appeal in question.

It is said the appeal was not "taken" until the allowance thereof was filed in the office of the District Court for the District of Alaska.

In *Credit Company* v. *Arkansas Central Railway Company*, 128 U. S. 258, a final decree had been entered in the Circuit Court for the Eastern District of Arkansas dismissing a bill for want of equity on the 22d of January, 1883, and on the 22d of January, 1885, a petition for an appeal was presented to Mr. Justice Miller in Washington and allowed, citation signed, and bond approved. These papers were filed with the clerk of the Circuit Court, January 27, 1885, being five days after the expiration of two years from the date of the final decree. It was ruled that an appeal could not be said to be "taken" until it was in some way presented to the court which made the decree appealed from, thereby putting an end to its jurisdiction over the cause and making it its duty to send it to the appellate court.

In *Brandies* v. *Cochrane*, 105 U. S. 262, it was decided that in the absence of a petition and allowance, the filing of the appeal bond, duly approved by a justice of this court, was sufficient evidence of the allowance of an appeal, and was a compliance with the law requiring the appeal to be filed in the clerk's office.

In *Brown* v. *McConnell*, 124 U. S. 489, it was held that the signing of a citation returnable to the proper term of this court, though without the acceptance of security, nevertheless constituted an allowance of appeal

which would enable this court to take jurisdiction and to afford the appellants an opportunity to furnish the requisite security here.

In these cases the original citation and the original writ of supersedeas together with certified copies of the assignment of errors and of the supersedeas bond and of the orders allowing the appeals, were filed in the District Court, September 14, 1900. This was held by the Circuit Court of Appeals sufficient to give effect to the appeals, and we concur in that conclusion if treated as open to re-examination here.

It is also contended that an appeal did not lie from the orders of July 23 and August 10, inasmuch as they were interlocutory orders in respect of the appointment of a receiver. June 6, 1900, an act was passed "making further provision for the civil government in Alaska and for other purposes," (31 Stat. 321, c. 786,) section 504 of which provided: "Appeals and writs of error may be taken and prosecuted from the final judgments of the District Court for the District of Alaska or any division thereof direct to the Supreme Court of the United States in the following cases, namely: . . . and that in all other cases where the amount involved or the value of the subject-matter exceeds five hundred dollars, the United States Circuit Court of Appeals for the Ninth Circuit shall have jurisdiction to review by writ of error or appeal the final judgments, orders, of the District Court."

Section 507 read as follows: "An appeal may be taken to the Circuit Court of Appeals from any interlocutory order granting or dissolving an injunction, refusing to grant or dissolve an injunction, made or rendered in any cause pending before the District Court within sixty days after the entry of such interlocutory order. The proceedings in other respects in the District Court in the cause in which such interlocutory order was made shall not be stayed during the pendency of such appeal, unless otherwise ordered by the District Court."

Section 508 provided that "all provisions of law now in force regulating the procedure and practice in cases brought by appeal or writ of error to the Supreme Court of the United States or to the United States Circuit Court of Appeals for the Ninth Circuit, except in so far as the same may be inconsistent with any provision of this act, shall regulate the procedure and practice in cases brought to the courts, respectively, from the District Court for the District of Alaska."

Section seven of the judiciary act of March 3, 1891, as amended by the act of February 18, 1895, (28 Stat. 666, c. 96,) provided that where upon a hearing in equity in a District Court or a Circuit Court, an injunction should be granted, continued, refused, or dissolved by an interlocutory order or decree, or an application to dissolve an injunction should be refused, an appeal might be taken from such interlocutory order or decree to the Circuit Court of Appeals within thirty days from the entry

of such order or decree; "and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court during the pendency of such appeal." On June 6, 1900, the section was further amended so as to allow such appeals from orders appointing a receiver. (31 Stat. 660, c. 803.) Reading these acts in *pari materia*, as we should, it may well be concluded that appeals were thereby authorized from the District Court of Alaska from interlocutory orders appointing receivers, and that such appeals might be prosecuted from that court within sixty days from the entry of such orders. Moreover, the order of July 23 granted an injunction in connection with the appointment of the receiver. In the case of the *Tampa Railroad Company*, 168 U. S. 583, decided before the statute was amended, it was held that an appeal would lie from such an order and would bring up the entire order, including the appointment.

In *Highland Avenue Railroad* v. *Equipment Company*, 168 U. S. 627, the order was confined to the appointment of the receiver, and contained no injunction.

The Circuit Court of Appeals, however, held that these orders were final decrees, and appealable as such. As we are of opinion that an appeal was allowable on other grounds we need not discuss the correctness of this view.

Granting all this, it is further insisted that the writ of supersedeas was void because . ected to be issued by the Court of Appeals as a court. By section four of the act of March 3, 1891, it is provided that "the review, by appeal, by writ of error, or otherwise, from the existing Circuit Courts shall be had only in the Supreme Court of the United States or in the Circuit Courts of Appeals hereby established according to the provisions of this act regulating the same;" and by section eleven that "any judge of the Circuit Courts of Appeals, in respect of cases brought or to be brought to that court, shall have the same powers and duties as to the allowance of appeals or writs of error, and the condition of such allowance, as now by law belong to the justices or judges in respect of the existing courts of the United States respectively." That this court as a court has power to issue a writ of supersedeas under section 716 of the Revised Statutes is clear for that section concedes its power to issue writs not specifically provided for by statute, which may be necessary for the exercise of its jurisdiction and agreeably to the usages and principles of law. This is equally true of the Circuit Courts of Appeals under § 12 of the act of March 3, 1891.

Although the issue of the writ is not ordinarily required there are instances in which it has been done, under special circumstances, and in furtherance of justice. *Stockton* v. *Bishop*, 2 How. 74; *Hardeman* v. *Anderson*, 4 How. 640; *Ex parte Mil. Railroad Company*, 5 Wall. 188.

In *In re Claasen*, 140 U. S. 200, we held, referring to sections 1000 and 1007 of the Revised Statutes, that a justice of this court had authority not

only to allow the writ of error but also to grant the supersedeas. After the decision in that case Rule 36 was adopted providing that any justice of this court or any Circuit Judge within his circuit or any District Judge within his district might allow an appeal or writ of error, take proper security, and sign the citation, and that he might "also grant a supersedeas and stay of execution, or of proceedings, pending such writ of error or appeal."

The court below had refused to grant an appeal and as an appeal lay, the judge of the Circuit Court of Appeals had the power to award it and to grant a supersedeas, and if in his judgment a writ of supersedeas was required, under the particular circumstances, the order for it to issue was not in itself void, nor was the process void, issued under such order. Obedience to an order granting a supersedeas is as much required as to an order for a writ of supersedeas and to the writ thereupon issued. The essential point is that the order or decree below is superseded, and the parties affected must govern themselves accordingly.

Nor do we think that the language used in section 507 of the Alaska Code operated as a limitation on the power of the Court of Appeals to grant a supersedeas. It is true that the section provided that "the proceedings in other respects in the District Court in the cause in which such interlocutory order was entered, shall not be stayed during the pendency of such appeal, unless otherwise ordered by the District Court." And similar language was used in section seven of the judiciary act of March 3, 1891.

In *In re Haberman Manufacturing Company*, 147 U. S. 525, 530, it was held that in view of the terms of the act the lower court had a discretion to grant or refuse a supersedeas, and that thereupon this court would not issue a mandamus to command the judge of that court to approve a supersedeas bond, to supersede an injunction, and to enter an order vacating the injunction. Even if the language used be given this scope beyond proceeding with the main cause, it nevertheless does not interfere with the inherent power of the appellate court to stay or supersede proceedings on appeal from such orders as those here. Tested by the principles and rules which relate to chancery proceedings, the power of the appellate court to render its jurisdiction efficacious, the court below refusing to do so, is unquestionable.

The frame of the writs in these two cases, one of which is attacked on this application, was approved by a specific order of the Circuit Judge; but it is objected that so much thereof as directed the receiver to restore the property taken by him was void. The authorities are many that where the appointment of a receiver is superseded, it may become his duty to restore that which has come to his hands to the parties from whom it has been withdrawn, and that this may be directed to be done. It is at all events

evident that an order that he should do so is not void in itself. We cannot on this application review the judgment of the Circuit Court of Appeals sustaining such an order and approving of the writs as issued.

The opinion of the Circuit Court of Appeals presents a comprehensive review of the facts and circumstances surrounding the granting of the orders appealed from, but it has not been necessary to recapitulate these matters at length on this inquiry. The question before us is whether petitioner is unlawfully restrained of his liberty by way of punishment for violation of orders absolutely void.

The distinction between a total want of power and a defective exercise of it is obvious, and want of power cannot be predicated of mere errors, if such were committed here, which we do not intimate.

We hold that the Circuit Court of Appeals had jurisdiction in the premises, and was clothed with the power to pass on all questions in respect of the means taken to enforce and maintain it. We are not called on to revise its conclusions on this application. It is enough that, in our judgment, it has not exceeded its powers.

Leave denied.

True copy.

Test:

Clerk Supreme Court, U. S.